104

Supreme Court, U.S.
FILED

(2)

08133 JUL 28 2008

No.

OFFICE OF THE CLERK
William K. Suter, Clerk

IN THE

Supreme Court of the United States

THE CADLE COMPANY, PETITIONER

v.

JOSEPH M. FRIEDHEIM AND JOYCE A. FRIEDHEIM

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

BRUCE W. AKERLY
Counsel of Record

Bell Nunnally & Martin LLP
3232 McKinney Avenue
Suite 1400
Dallas, Texas 75204
(214) 740-1430

Attorneys for Petitioner

CURRY & TAYLOR ♦ (202) 350-9073

QUESTIONS PRESENTED

When an individual files for protection under the United States Bankruptcy Code, 11 U.S.C. § 101, *et seq.*, (the "**Bankruptcy Code**"), all of his real and personal property become property of the bankruptcy estate, 11 U.S.C. § 541(a), subject to a claim of exemption under federal or state law. *See* 11 U.S.C. § 522(b). A creditor may object to the claim of exemption. *See* Fed. R. Bankr. P. 4003(b). Although only the debtor benefits from the exemption and is uniquely in possession of evidence to support the exemption, Bankruptcy Rule 4003(c) provides that "the objecting party has the burden of proving that the exemptions are not properly claimed." Fed. R. Bankr. P. 4003(c) ("**Bankruptcy Rule 4003(c)**"). Bankruptcy Rule 4003(c) does not: define the applicable burden of proof; distinguish between burden of persuasion or burden of production; state whether such burden is applicable when a debtor elects state exemptions, and address the effect when a debtor claims state exemptions and the burden of proof under applicable state law differs from that prescribed under Bankruptcy Rule 4003(c).

This appeal addresses issues of first impression. First, when a debtor claims exemptions under state law and state law provides a burden of proof different than that applicable under Bankruptcy Rule 4003(c), which controls? Second, if Bankruptcy Rule 4003(c) controls, should a burden shifting requirement be read into Bankruptcy Rule 4003(c) to balance the equities between the parties?

RULE 29.6

Petitioner is not a publicly traded company. There is no parent or publicly held company owning 10% or more of the stock of Petitioner.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULE 29.6 ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT PROVISIONS INVOLVED 2

STATEMENT 2

REASONS FOR GRANTING THE PETITION 4

CONCLUSION 23

APPENDIX

Circuit Court Opinion 1a
District Court Memorandum, Opinion & Order 3a
Bankruptcy Court Order on the Cadle Company's Objection to Debtors' Schedule C Exemptions 13a

TABLE OF AUTHORITIES

Page

FEDERAL CASES

CIMINO V. RAYMARK INDUSTRIES, INC., 151 F.3D 297 (5TH CIR. 1998) 15
CITIES SERV. OIL CO. V. DUNLAP, 308 U.S. 208 (1939) 15
ERIE R. CO. V. TOMPKINS, 304 U.S. 64 (1938) 14
GROGAN V. GARNER, 498 U.S. 279 (1991) 17
IN RE BARNES, 275 B.R. 889 (BANKR. E.D. CAL. 2002) .. 15, 16
IN RE CARTER, 182 F.3D 1027 (9TH CIR. 1999) 20
IN RE COLE, 205 B.R. 382 (BANKR. E.D. TEX. 1997) 12, 19
IN RE COOPER, 128 B.R. 632 (BKRTCY. E.D. TEX. 1991) 18
IN RE FOSTER, 360 B.R. 210 (BANKR. E.D. TEX. 2006) 11
IN RE HARRINGTON, 306 B.R. 172 (BANKR. E.D. TEX. 2003) 22
IN RE JARBOE, 365 B.R. 717 (BANKR. S.D. TEX. 2007) 11
IN RE JUZWIAK, 89 F.3D 424 (7TH CIR. 1996) 5
IN RE LESTER, 141 B.R. 157 (BKRTCY. S.D. OHIO 1991) 18, 19
IN RE MAUER, 268 B.R. 335 (BANKR. W.D. N.Y. 2001) ... 20, 21
IN RE PATTERSON, 128 B.R. 737 (BANKR. W.D. TEX. 1991) 22
LEHMAN BROS. V. SCHEIN, 416 U.S. 386 (1974) 17
NATIONWIDE MUTUAL INS. CO. V. UNAUTHORIZED PRACTICE OF LAW COMMITTEE, 283 F.3D 650 (5TH CIR. 2002) 17
PALMER V. HOFMAN, 318 U.S. 109 (1943) 14
SANTIBANEZ, M.D. V. WIER MCMAHON CO., 105 F.3D 234 (5TH CIR. 1997) 10
TAYLOR V. FREELAND & KRONZ, ET AL., 503 U.S. 638 (1992) 11
TEXAS COMMERCE BANK V. MCCREARY, 677 S.W.2D 643 (TEX. APP. - DALLAS 1984, NO WRIT) 10
UNITED TEACHERS ASSOCS. INC. CO. V. UNION LABOR LIFE INS. CO., 414 F.3D 558 (5TH CIR. 2005) 17

VANSTON BONDHOLDERS PROTECTIVE COMM. V. GREEN, 329 U.S. 156 (1946) 13

STATE CASES

DALE V. FINANCE AM. CORP., 929 S.W.2D 495 (TEX. APP. - TEXARKANA 1996, NO WRIT) 10
HAMMERMAN & GAINER, INC. V. BULLOCK, 791 S.W.2D 330 (TEX. APP. AUSTIN 1990, NO WRIT) 10
JACOBS V. ADAMS, 874 S.W.2D 166 (TEX. APP. - HOUSTON [14TH DIST.] 1994, NO WRIT) 10
JONES V. LATHAM, 671 S.W.2D 612 (TEX. APP. - EASTLAND 1984, WRIT REF'D N.R.E.) 10
RALEIGH V. ILLINOIS DEPT. OF REVENUE, 530 U.S. 15 (2000) 3, 12, 16
LOZANO V. LOZANO, 975 S.W.2D 63 TEX. APP. HOUSTON [14TH DIST.] 1998, REV. DENIED 9
ROOSTH V. ROOSTH, 889 S.W.2D 445 TEX. APP. HOUSTON [14TH DIST.] 1994 10
RUCKER V. RUCKER, 810 S.W.2D 793 TEX. APP.- HOUS. [14TH DIST.], 1991 ..... 9, 16

STATUTES

11 U.S.C. § 107 et seq i
11 U.S.C. § 522(b) 5
11 U.S.C. § 522(l) ..... i, 11
11 U.S.C. § 541(a) 5
28 U.S.C. § 1254(1) 2
28 U.S.C. § 2075 ..... 3, 12, 13, 14
TEX. CIV. PRAC. & REM. CODE ANN. § 31.002(a)(2) 9
TEX. PROP. CODE ANN. § 42.0021 (VERNON 2000) ..... *passim*

RULES

FED. R. BANKR. P. 4003(b) i
FED. R. BANKR. P. 4003(c) ..... *passim*
FED. R. CIV. P. 8(e) 14

SUPREME COURT RULES 13.1 1
TEX. R. APP. P. 58 ..... 4, 17

OTHER AUTHORITIES

FEDERAL PRACTICE AND PROCEDURE: FEDERAL PRACTICE DESKBOOK § 62 14

PETITION FOR A WRIT OF CERTIORARI

Petitioner THE CADLE COMPANY ("**Cadle**") respectfully petitions that a Writ of Certiorari be issued to review the judgment and decision of the United States Court of Appeals for the Fifth Circuit entered April 20, 2008, because that decision decided an important question of federal law that has not been, but should be, settled by this Court.

OPINIONS BELOW

On November 28, 2006, the Bankruptcy Court entered its unpublished *Order on The Cadle Company's Objection to Debtor's Schedule C Exemptions* (the "**Order**"), (App. 13a-15a) Cadle appealed to the District Court.

On August 14, 2007, the District Court filed its unpublished *Memorandum Opinion and Order* ("**Opinion**") affirming the Bankruptcy Court's decision. (App. 3a-12a) Cadle appealed to the United States Court of Appeals for the Fifth Circuit (the "**Fifth Circuit**").

On April 29, 2008, the Fifth Circuit filed its *Per Curiam* decision affirming the decisions of the courts below. (App. 1a-2a)

JURISDICTION

The Judgment of the United States Court of Appeals for the Fifth Circuit was filed on April 29, 2008. Pursuant to Supreme Court Rules 13.1 and 13.3, this petition has been filed within 90 days of the entry

of the Judgment. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

Bankruptcy Rule 4003(c) provides:

> (c) Burden of Proof. In any hearing under this rule, the objecting party has the burden of proving that the exemptions are not properly claimed. After hearing on notice, the court shall determine the issues presented by the objections.

Fed. R. Bankr. P. 4003(c)("**Bankruptcy Rule 4003(c)**").

STATEMENT

In 2005, Respondent/Debtors JOSEPH M. FRIEDHEIM and JOYCE A. FRIEDHEIM's (the "**Friedheims**") filed for protection under chapter 7 of the Bankruptcy Code. They claimed four individual retirement accounts (the "**IRAs**") totaling in excess of $375,000 as exempt under Texas law. [1] *See* Tex. Prop. Code Ann. § 42.0021 (Vernon 2000) ("**Section 42.0021**"). Section 42.0021 provides that individual retirement accounts are exempt from claims of creditors if they "qualify under the applicable provisions of the Internal Revenue Code ["**IRC**"] of 1986." *Id.* Cadle timely objected to the claim that the IRAs were exempt under Texas law.

---

[1] All property of any value owned by the Friedheims, including the IRAs, was claimed as exempt, including a house owned free and clear worth almost $2,000,000.

Under Texas law, a debtor claiming an account exemption under Section 42.0021 must show that the account qualifies under the IRC. Only then does the burden shift to the party seeking to access the exempt property. Nevertheless, the Bankruptcy Court determined that Cadle held **the entire burden of proof**, production and persuasion, to establish the IRAs were not qualified under the IRC. (*See* App. 14a - Cadle bore "the burden of proving [by a preponderance of the evidence] that the Debtors' exemption are not properly claimed.") This conflicts with the burden of proof required under Texas law.

When a debtor claims exemptions under state law, the state's substantive burden of proof standards, if any, should apply in determining whether the debtor qualifies for the exemption, rather than the standard set forth in Bankruptcy Rule 4003(c). In such situations, Bankruptcy Rule 4003(c) represents an impermissible infringement on subtsantive rights. *See Raleigh v. Illinois Dept. of Revenue*, 530 U.S. 15 (2000); 28 U.S.C. § 2075.

Alternatively, if the Court determines that Bankruptcy Rule 4003(c) is nevertheless applicable, the Court should adopt a shift in burden standard applicable to Bankruptcy Rule 4003(c). Property claimed as exempt is *prima facie* exempt until the presumption of validity is rebutted. Once an objection is filed and "persuasive" evidence is presented to rebut the presumption of validity, the burden should shift to the claimant/debtor to "produce" a preponderance of evidence to support allowance of the claimed exemption.

REASONS FOR GRANTING THE PETITION

Cadle objected to the Friedheims' claim of exemption for the IRAs, questioning whether the IRAs qualified under the IRC. Cadle served discovery on the Friedheims seeking documentation evidencing that the IRAs were qualified. In response, the Friedheims produced booklets, pamphlets, applications, and statement of account. No documents showed definitively that the IRAs were approved and qualified under the IRC.

At the conclusion of an evidentiary hearing, the Bankruptcy Court ruled that Cadle had the entire burden of proof on the issue of whether the IRAs qualified under the IRC.[2]

The District Court affirmed. In its Opinion, the District Court states: "Neither the parties nor the court were able to find an articulation by the Texas state courts of the applicable standard of proof [under Section 42.0021] which must be met by the objecting party." (App. 8a) Instead of making an *Erie* guess as to what the Texas courts would do or certify the question to the Texas Supreme Court, *see* Tex. R. App. P. 58, the District Court defaulted to holding that

---

[2] The Bankruptcy Court ruled in the alternative that, if the Friedheim's bore the burden of proof, i.e.,"if the Court's reading of Federal Rule of Bankruptcy Procedure 4003(c) and the case law is not correct, the question before the Court would be whether it is more likely than not that the IRAs are exempt under Texas law and federal law based on the record made this afternoon." (App. 14a) The Bankruptcy Court concluded that the Friedheims met this burden. The Bankruptcy Court's either/or ruling illustrates no legal analysis of the burden of proof issue.

Bankruptcy Rule 4003(c) would govern the burden of proof issue. It agreed with the Bankruptcy Court that Cadle bore the entire burden of proof.

Cadle appealed to the Fifth Circuit. The Fifth Circuit entered a *Per Curiam* decision which provides no basis to understanding why it affirmed the decisions below.

1. Summary of Argument

Discharge, the holy grail of bankruptcy, is a privilege, not a right. *See In re Juzwiak*, 89 F.3d 424, 427 (7th Cir. 1996). When an individual files bankruptcy, all of his real and personal property becomes property of the "bankruptcy estate" available to satisfy creditor claims. 11 U.S.C. § 541(a). However, a debtor may choose to exempt certain property from the reach of creditors by claiming such property as exempt under state or federal law. 11 U.S.C. § 522(b) ("**Section 522(b)**").

The debtor is the beneficiary of a claimed exemption. The debtor is uniquely in possession of facts and other evidence to support the exemption. Nevertheless, Bankruptcy Rule 4003(c) places the entire burden of proof on the objecting party to disprove the exemption. Not only is this patently unfair, it effectively results, in many cases, in exemption by declaration. In most cases, creditors do not have the economic resources to mount an effective challenge to claimed exemptions.

Bankruptcy Rule 4003(c) provides that the objecting party has the burden of proof; however, it

fails to distinguish between the burden of persuasion and the burden of production and does not state whether such burden is applicable when the debtor elects state exemptions. Bankruptcy Rule 4003(c) conflicts with Texas law regarding burden of proof when determining application of an exemption under Section 42.0021. Under Texas law the burden of production falls on the party claiming the exemption to provide evidence that he is entitled to the exemption. Because property claimed as exempt is effectively removed from the bankruptcy estate (at the debtor's request) and is, as a result, not available to be distributed to creditors, the debtor, not the creditor, should bear the initial burden of proving the validity of the exemption. Only then should the burden shift to the creditor to persuade that the exemption should be disallowed.

This Court should recognize a shifting burden inherent in Bankruptcy Rule 4003(c). Property claimed as exempt is *prima facie* exempt until the presumption of validity is rebutted. Once an objection is filed and "persuasive" evidence is presented to rebut the presumption of validity, the burden should shift to the debtor to "produce" a preponderance of evidence to support allowance of the claimed exemption.

2. Section 42.0021

Section 42.0021 provides, in pertinent part:

ADDITIONAL EXEMPTION FOR CERTAIN SAVINGS PLANS.

(a) In addition to the exemption prescribed by Section 42.001, a person's right to the assets held in or to receive payments, whether vested or not, under any stock bonus, pension, profit-sharing, or similar plan, including a retirement plan for self-employed individuals, and under any annuity or similar contract purchased with assets distributed from that type of plan, and under any retirement annuity or account described by Section 403(b) or 408A of the Internal Revenue Code of 1986, and under any individual retirement account or any individual retirement annuity, including a simplified employee pension plan, and under any health savings account described by Section 223 of the Internal Revenue Code of 1986, is exempt from attachment, execution, and seizure for the satisfaction of debts unless the plan, contract, or account does not qualify under the applicable provisions of the Internal Revenue Code of 1986. A person's right to the assets held in or to receive payments, whether vested or not, under a government or church plan or contract is also exempt unless the plan or contract does not qualify under the definition of a government or church plan under the applicable provisions of the federal Employee Retirement Income Security Act of 1974. If this subsection is held invalid or preempted by federal law in whole or in part or in certain circumstances, the subsection remains in effect in all other respects to the maximum extent permitted by law.

(b) Contributions to an individual retirement account, other than contributions to a Roth IRA

described in Section 408A, Internal Revenue Code of 1986, or an annuity that exceed the amounts deductible under the applicable provisions of the Internal Revenue Code of 1986 and any accrued earnings on such contributions are not exempt under this section unless otherwise exempt by law. Amounts qualifying as nontaxable rollover contributions under Section 402(a)(5), 403(a)(4), 403(b)(8), or 408(d)(3) of the Internal Revenue Code of 1986 before January 1, 1993, are treated as exempt amounts under Subsection (a). Amounts treated as qualified rollover contributions under Section 408A, Internal Revenue Code of 1986, are treated as exempt amounts under Subsection (a). In addition, amounts qualifying as nontaxable rollover contributions under Section 402(c), 402(e)(6), 402(f), 403(a)(4), 403(a)(5), 403(b)(8), 403(b)(10), 408(d)(3), or 408A of the Internal Revenue Code of 1986 on or after January 1, 1993, are treated as exempt amounts under Subsection (a). Amounts qualifying as nontaxable rollover contributions under Section 223(f)(5) of the Internal Revenue Code of 1986 on or after January 1, 2004, are treated as exempt amounts under Subsection (a).

* * *

(f) A reference in this section to a specific provision of the Internal Revenue Code of 1986 includes a subsequent amendment of the substance of that provision.

In Texas, the party claiming an exemption under Section 42.0021 has the burden of proving entitlement to the exemption. *See Rucker v. Rucker*, 810 S.W.2d 793, 795-96 (Tex. App.—Hous. [14th Dist.], 1991), writ denied).[3] *Rucker* involved a divorce proceeding. The divorce decree awarded the wife one-half of the husband's, a former police officer with the Houston Police Department, "retirement plan and/or pension plan." *Id.* at 794. Six years after their divorce, the husband was injured on the job, determined to be permanently disabled, and granted a disability pension. *Id.* His wife, claiming the disability pension constituted retirement benefits, sought turnover of her awarded portion. *Id.* The trial court entered a turn over order against the husband, requiring him to turn over one-half of his interest in the disability payments. *Id.* On appeal, the husband alleged, in part, that the benefit payments were exempt under applicable state law from disbursement under a turnover order. *Id.* at 795. That law, Tex. Civ. Prac. & Rem. Code Ann. § 31.002(a)(2) and (f) refers to Section 42.0021 which provides that retirement plan payments are exempt from attachment, execution and seizure "unless they do not qualify under the applicable provisions of the Internal Revenue Code of 1986." *Id.*

---

[3] *Cf. Lozano v. Lozano*, 975 S.W.2d 63 (Tex. App. – Hous. [14th Dist.] 1998, rev. denied). *Lozano*, born out of the same court as *Rucker*, is the only case that comments on a shifting burden of proof under Section 42.0021. It has been flatly criticized within the same court. Justice Yates dissented from the majority stating that, in holding that the objecting party has the burden to demonstrate the account qualified under the IRC, the court ignored the *stare decisis* impact of *Rucker*, which held that the burden lay entirely with the party claiming the exemption. *Id.* at 70. The Texas Supreme Court has not weighed in on the issue.

The *Rucker* court reiterated the long standing law in Texas regarding the applicable burden of proof: "It is the burden of the party claiming the exemption to prove that he is entitled to it." *Id.* at 795-96, *citing Hammerman & Gainer, Inc. v. Bullock*, 791 S.W.2d 330 (Tex. App. Austin 1990, no writ) (one claiming statutory tax exemption has burden of proof), *Texas Commerce Bank v. McCreary*, 677 S.W.2d 643 (Tex. App. – Dallas 1984, no writ) (one claiming homestead exemption has burden of proof), *Jones v. Latham*, 671 S.W.2d 612 (Tex. App. – Eastland 1984, writ ref'd n.r.e.) (one claiming Securities Act exemption has burden of proof). The court applied this burden of proof, which amounted to one of production, to the husband, finding that he had failed to introduce evidence "showing qualification under the Internal Revenue Code of 1986." *Id.* at 796. *Accord Santibanez, M.D. v. Wier McMahon Co.*, 105 F.3d 234, 235 (5th Cir. 1997) (*citing Roosth v. Roosth*, 889 S.W.2d 445, 459-60 (Tex. App. Houston [14th Dist.] 1994, writ denied); *Jacobs v. Adams*, 874 S.W.2d 166, 167 (Tex. App. – Houston [14th Dist.] 1994, no writ); *Dale v. Finance Am. Corp.*, 929 S.W.2d 495, 498-99 (Tex. App. – Texarkana 1996, no writ).

The Bankruptcy Court completely ignored this substantive burden of proof standard and the District Court, although noting the standard, erroneously applied it under Bankruptcy Rule 4003(c) to the burden established by Section 42.0021(a).

3. Federal Rule of Bankruptcy Procedure 4003(c)

Once the debtor claims property as exempt under Section 522(b) it is *prima facie* valid unless a

creditor objects. Once the creditor objects, the focus shifts to the validity of the creditor's objection. If there is an objection to a debtor's claim of exemption, the asset is no longer deemed exempt under Section 522. 11 U.S.C. § 522(l). *See generally Taylor v. Freeland & Kronz, et al.*, 503 U.S. 638 (1992).

Experience demonstrates that, when an objection to exemption is filed, especially where the exemption is based on state law, bankruptcy courts tend to ignore the burden of proof required under state law regarding the claimed exemption[4] focusing instead on the burden of proof expressed in Rule 4003(c) of the Federal Rules of Bankruptcy Procedure.

Rule 4003(c) provides:

> **(c) Burden of Proof**. In any hearing under this rule, the objecting party has the burden of proving that the exemptions are not properly claimed. After hearing on notice, the court shall

---

[4] Because 11 U.S.C. § 522(l) deems a debtor's assets exempt as listed under subsection (b), section 522(l) completely ignores the burden of proof placed on the debtor pursuant to applicable state law. It makes no sense that a debtor should benefit from claiming a state exemption yet have no responsibility to show that he is entitled to the exemption. For this reason, at least one court in Texas found that, under Bankruptcy Rule 4003(c), the debtor has the initial burden of production to establish that the asset qualifies for the exemption claimed under state law. *See In re Foster*, 360 B.R. 210, 213-14 (Bankr. E.D. Tex. 2006). Unfortunately, the courts in the instant case chose not to follow *Foster*. Accord *In re Jarboe*, 365 B.R. 717, 721 (Bankr. S.D. Tex. 2007) ("It is the burden of the party claiming an exemption under § 42.0021 of the Texas Property Code to prove that he is entitled to it.").

determine the issues presented by the objections.

There are cases in Texas interpreting Bankruptcy Rule 4003(c) to place the burden of proof on the objecting party to prove the debtor is not entitled to the claimed exemption.[5] *See e.g., In re Cole*, 205 B.R. 382 (Bankr. E.D. Tex. 1997). However, these cases, including *Cole*, ignore the burden required under applicable state law exemptions and have not delineated whether the burden of proof includes both the burden of persuasion and the burden of production.

4. The Burden of Proof Under Section 42.0021 (Substantive Law) Should Prevail Over Bankruptcy Rule 4003(c) (Procedure)

The Federal Rules of Bankruptcy Procedure are promulgated by this Court pursuant to the authority granted in 28 U.S.C. § 2075. Section 2075 provides that this Court "shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure in cased under title 11." 28 U.S.C. § 2075. The section further provides, however, that "[s]uch rules shall not abridge, enlarge, or modify any substantive rights." *Id.*

In *Raleigh, supra*, this Court, in analyzing "the burden of proof on a tax claim in bankruptcy court when the substantive law creating the tax obligation

---

[5] The Bankruptcy Court cited *Cole* in his bench ruling. The District Court and Friedheims also relied on *Cole* as authority for placing the burden of proof on Cadle at the hearing on its Objection to Exemptions.

puts the burden on the tax payer" held that "bankruptcy does not alter the burden imposed by the substantive law." *Id.* at 17. In *Raleigh*, the president of a corporation purchased an airplane out of state and moved it to Illinois. *Id.* at 17. The State of Illinois claimed the purchase was subject to that State's use tax. *Id.* at 18. The State of Illinois may issue a Notice of Tax Liability against the entity and a Notice of Penalty Liability against any corporate officer responsible for paying the tax. *Id.* At the time the State of Illinois determined that a tax was delinquent, the company was out of business and the responsible officer was in bankruptcy. *Id.* The State of Illinois filed a Notice of Penalty Liability against the individual officer/debtor. *Id.* Illinois law shifts the burden of production and persuasion from the State to the responsible officer, once the Notice of Penalty Liability is issued. *Id.*

This Court further noted that "[g]iven its importance to the outcome of cases, we have long held the burden of proof to be a 'substantive' aspect of a claim." *Id.* 20-21. ("That is, the burden of proof is an essential element of the claim itself; one who asserts a claim is entitled to the burden of proof that normally comes with it."). The Court rejected the notion that merely because the issue involved a "claim" that bankruptcy, rather than state substantive law, should control, particularly when the issue does not involve distribution of assets but rather "the validity of claims in the first instance." *Id.* at 16, *citing Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 161 (1946) ("...*Vanston* specifically states [that validity of claims] is to be determined by reference to state law."). Finally, it is significant that the Court notes one

reason for shifting the burden of proof is that the party with the most access to sources of proof is the taxpayer. *Id.* at 21 n. 1.

Further, the precedents under the *Erie* doctrine dictate that federal courts must apply state law when the issue is one of substance and federal law when the issue is one of procedure. *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). Although the distinction between substance and procedure is not always clear, this Court has held that state rules apply as to burdens of proof. *See* Wright & Kane, *Federal Practice and Procedure: Federal Practice Deskbook § 62* ("Commentators were critical of the distinction [between substance and procedure], but it gave no undue difficulty in the early years of the *Erie* era, when the most notable Supreme Court decisions were those holding that the federal court must apply state rules as to burden of proof," *citing Palmer v. Hofman*, 318 U.S. 109 (1943)).

In *Palmer*, this Court held that the burden of proving a claim is a question of local law which the federal courts must apply. *Palmer*, 318 U.S. at 117. In *Palmer*, that case, this Court analyzed claims for contributory negligence based on common law and Massachusetts statute. *Id.* at 116. Rejecting respondents' argument that Federal Rule of Civil Procedure 8(c) states that contributory negligence is an affirmative defense, thereby placing the burden on petitioners, this Court found that because the contributory negligence claim was based on state law, the federal court erred by not applying the burden of proof prescribed under state law to prevail on a contributory negligence claim. *Id.* at 117-18.

Similarly, in *Cities Service Oil Company v. Dunlap*, the petitioner claimed under Texas law that the burden of proof was on the party attacking petitioner's legal title to property where petitioner was a bona fide purchaser for value without notice. *Cities Serv. Oil Co. v. Dunlap*, 308 U.S. 208, 210 (1939). The District Court and Court of Appeals ruled that the issue was one of practice or procedure, reasoning that the question concerned what the proper practice was in courts of equity and found that practice followed in Texas courts was not controlling since Texas did not have courts of equity. *Id.* at 211-12. This Court expressly rejected their reasoning that the issue concerned only practice in courts of equity and found that petitioner was entitled to the protection afforded under Texas law.[6] *Id.*

Notably, one bankruptcy court, dealing with a situation involving an exemption claimed under state law which allocates the burden of proof to the claimant, has questioned whether "[t]he allocation of the burden of proof in [Bankruptcy] Rule 4003(c)" runs "afoul with the Supreme Court's recent decision" in *Raleigh*. *In re Barnes*, 275 B.R. 889, 898-99 n. 2 (Bankr. E.D. Cal. 2002). While the court's comments may be *dicta*, they certainly highlight the problem, inherent in the instant case, with Bankruptcy Rule 4003(c) when state law

---

[6] The Fifth Circuit has adopted these decisions; however, because they simply affirmed the decisions of the courts below, *per curiam*, it does not appear they chose to follow them in the instant case. *See e.g.*, *Cimino v. Raymark Industries, Inc.*, 151 F.3d 297, 311 (5th Cir. 1998) ("Substantive law includes not only the factual elements which must be found to impose liability and fix damages, but also the burdens of going forward with evidence and of persuasion thereon.") (citations omitted).

exemptions involving applicable burdens of proof are asserted by debtors in bankruptcy.

In *Barnes*, the debtors claimed an annuity as exemption under California law. *Barnes*, 275 B.R. at 896. The trustee objected to the claimed exemption. *Id.* The bankruptcy court overruled the objection, without prejudice, because the debtors had not claimed the annuity as exempt on their Schedule C. *Id.* at 898. In doing so, the bankruptcy court, citing *Raleigh, supra*, notes that, while the trustee has the burden of proof under Bankruptcy Rule 4003(c): "when the matter in dispute is governed by nonbankruptcy substantive law, the burden of proof is dictated by that same nonbankruptcy law." *Id.* 898-99 n. 2.[7]

In the instant case, the Bankruptcy Court did not require the Friedheims to first prove that they were entitled to exempt their IRAs under Section 42.0021, completely ignoring Texas authority which holds that the party claiming the exemption bears the burden to prove entitlement to the exemption. *Rucker*, 810 S.W.2d 793. Nor did the Bankruptcy Court require them to produce documentation of the IRAs themselves, rather than substitutes for the contents of such documents.[8]

The District Court similarly erred in its application of the burden of proof. Although it

---

[7] The *Barnes* court also noted that the debtor must produce the actual documents which provide the basis for the account claimed to be exempt (an annuity contract), sustaining the "trustee's objection to the evidence offered as a substitute for the contents of the annuity policy." *Barnes*, 275 B.R. at 899 n 3.

[8] *Id.*

attempted to analyze the issue, it incorrectly determined no cases set forth the standard and, rather than undertaking an *Erie* guess or certify the issue to the Texas Supreme Court[9] to determine the proper standard under Texas law.[10] Instead, the District Court defaulted to the application of the burden of proof found under Bankruptcy Rule 4003(c).[11] Finally, because the

---

[9] See Tex. R. App. P. 58.

[10] *See United Teachers Assocs. Inc. Co. v. Union Labor Life Ins. Co.*, 414 F.3d 558, 565-66 (5th Cir. 2005) ("In order to determine questions of state law, federal courts look to final decisions of the state's highest court. While decisions of intermediate state appellate courts provide guidance, they are not controlling. If a state's highest court has not ruled on the issue in question, a federal court must determine, to the best of its ability, what the highest court of the state would decide." (internal citations omitted)); *see also Nationwide Mutual Ins. Co. v. Unauthorized Practice of Law Committee*, 283 F.3d 650 (5th Cir. 2002) (recognizing that Rule 58 of the Texas Rules of Appellate Procedure permits federal appellate courts to certify questions of Texas law having no controlling Supreme Court precedent and citing to *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974), for the proposition that the certification procedure allows a federal court, within its discretion, to put a novel state law question directly to the state's highest court).

[11] While the District Court's Opinion cites several cases which state that exemptions claimed by the debtor are presumed valid and that the objecting party holds the burden of proof to rebut that presumption, none of the cases analyze the proper standard of proof when a debtor claims state exemptions. Further, the District Court's reliance on this Court's decision in *Grogan v. Garner*, 498 U.S. 279 (1991) is flawed because that decision concerned the standard of proof required in a discharge action. In that case, this Court makes no statement concerning the burden of proof applicable to a claimed state exemption. The District Court's faulty legal conclusions placed the entire burden on Cadle to prove by a preponderance of the evidence that the Friedheims IRAs were not qualified and, therefore, not exempt under Section 42.0021.

Fifth Circuit affirmed without discussion, it can only be assumed that it found the reasoning of the Bankruptcy Court and District Court acceptable.

Because the court's below applied an incorrect burden of proof, as applicable under Texas law, their decisions should be reversed.

2. Alternatively, The Court Should Adopt a Burden Shifting Standard Applicable to Bankruptcy Rule 4003(c)

Assuming, *arguendo*, the burden of proof under Bankruptcy Rule 4003(c) is applicable, regardless of the presence of a state law burden of proof as to the claimed exemption, the issue turns to what kind of burden of proof is required under Bankruptcy Rule 4003(c). Cadle contends this Court should adopt a shifting burden standard under Bankruptcy Rule 4003(c).

The Bankruptcy Court incorrectly cited *Cole* for the proposition that "[t]he burden of proof is by a preponderance of the evidence; a more likely than not test." (App. 14a) The court in *Cole* actually states:

> Under Bankruptcy Rule 4003(c), the objecting party has the burden of proving that the exemption claimed, in this case homestead exemptions, are not properly claimed. *In re Cooper*, 128 B.R. 632, 635 (Bkrtcy. E.D. Tex. 1991). *This burden is satisfied when the objecting party introduces evidence which rebuts the 'prima facie effect of the claim of exemption.' In re Lester*, 141 B.R. 157, 161 (Bkrtcy. S.D. Ohio 1991). The general rule is that the exemption

> statute favors the debtor and is to be liberally construed. When an issue is in doubt because of the burden of proof provided and the Court would be required to speculate, the party upon whom the burden of proof ultimately rests must lose. *Id.* at 162. *Thus, the exemptions claimed by the Debtors are presumed valid until proven otherwise.*

Cole, 205 B.R. at 384-85. The burden of proof, as explained in *Cole*, is **not** "preponderance of the evidence – a more likely than not test." Rather, it is that a claimed exemption is presumed *prima facie* valid until the presumption is rebutted. To rebut the presumption, the objecting party must present "*persuasive* evidence" to support the contention that the presumption of validity must be rebutted. *Id.* at 384. This is a persuasion issue, not a production issue. *Cole* stands for the proposition that once evidence is submitted to the trier-of-fact to effectively rebut the presumption – i.e., persuades - the burden of proof shifts to the party claiming the exemption to **produce** a preponderance of credible, reliable and material evidence sufficient to support the claimed exemption. *Id.* at 385.

As noted below, the imposition of a direct and all encompassing burden on the objecting creditor – often without access to the same information available to debtors or the resources to fully litigate an objection to exemption – inappropriately shifts the focus of bankruptcy from generally including all property as part of a bankruptcy estate (subject to the debtor's attempt to exclude certain exempt property) to favoring and protecting certain property claimed by debtors as exempt from the reach of creditors.

Other courts in addressing objections to exemptions have held, appropriately so, that it is simply not enough for the debtor to state a claim of exemption and then sit back and tell the creditor: "prove me wrong." *See e.g., In re Carter*, 182 F.3d 1027, 1029-30 (9th Cir. 1999); *In re Mauer*, 268 B.R. 335 (Bankr. W.D. N.Y. 2001).

In *Mauer*, the Court recognized that "exemption by declaration" did not entitle a debtor to claim an exemption in the face of an objection:

> To the extent, if any, that the burden of proof provision of Bankruptcy Rule 4003 is implicated here, the Court rules that although the ultimate burden of going forward to bring these funds squarely within the ambit of an exemption shifted to the Debtor when the Trustee timely objected to the claim of exemption on the grounds that the exemptibility or non-exemptibility of the asset depended upon the production of documentary evidence that should be in the possession of, or is reasonably available to, the Debtor. In this writer's view, much like the Official Form for a Proof of Claim requires that a claim based upon a "writing" append a copy of the "writing," a claim of exemption which would stand or fall (in litigation) upon evidence more readily available to the Debtor than to the Trustee must eventually be supported by the Debtor with the evidence, if the Trustee has timely objected. **This writer does not believe in "exemption by declaration" in the face of a timely objection; a debtor may not claim assets exempt that are not exempt at law,**

> **and then put the trustee to the burden of disproving the exemption as a matter of law.**

Id. (emphasis added). In *Mauer*, the court clearly believed that the debtor held the burden of production to show that he was entitled to his exemption upon an objection filed by a creditor.

Similarly, in *In re Foster*, *supra*, the Honorable Bill Parker, Chief Judge, United States Bankruptcy Court, Eastern District of Texas, agreed with the holding in *Mauer* in ruling that, under Bankruptcy Rule 4003(c), the objecting party had the ultimate burden of persuasion, but that the debtor held the "initial burden of production or going forward with the evidence to establish that the referenced property qualifies for the claimed exemption before the objecting party is obligated to go forward with his proof. This is consistent with Texas law which requires an exemption claimant to prove that the property claimed as exempt actually qualifies for the exemption." *In re Foster*, 360 B.R. at 213-14.[12]

Although several other Texas bankruptcy courts have not expressly adopted a burden of production

---

[12] The Bankruptcy Court in this case does not address the holding in *Foster*. The District Court cited *Foster* in a footnote to its Opinion for the proposition that a debtor must do something more than merely claim the asset as exempt. However, the District Court ignores Judge Parker's statements concerning the standard and allocation of proof. Should this Court find Bankruptcy Rule 4003(c) governs objection to exemptions, the Court should hold that the Friedheims maintained the initial burden of proof to show that they were entitled to the exemption and that burden of production was not met. Opinion 7 n.2.

standard under Bankruptcy Rule 4003(c), as it applies to debtors, those courts have, at least, expressly recognized that recent cases have determined that a debtor must show something more than merely declaring an exemption. *See e.g., In re Harrington*, 306 B.R. 172, 181 (Bankr. E.D. Tex. 2003); *In re Patterson*, 128 B.R. 737, 740 (Bankr. W.D. Tex. 1991).

The reasoning of *Mauer* and the other cases noted – that a debtor is charged with the burden of production to prove entitlement to his exemption - is sound. It is the debtor, not the objector, who benefits from the exemption by keeping the claimed property out of the bankruptcy estate. Therefore, it is only logical that the debtor, who is often uniquely in possession of the documents and other resources pertinent to claiming and supporting the exemption, should bear the burden of production under Rule 4003. Thus, it was error for the Bankruptcy Court and the District Court, and the Fifth Circuit by affirming the lower court's decision, to determine that Cadle bore the entire burden of proof – both of persuasion and of production[13] – to establish that the IRAs were not qualified under the applicable IRC provisions. Therefore, the decisions of these courts should be reversed.

---

[13] The District Court, citing *Foster*, recognized the existence of cases which provide that debtors must do something more than merely schedule exemptions. However, it declined to follow the sound reasoning of *Foster*, which attempted to reconcile the conflict between claiming state exemptions (which have corresponding burdens applicable thereto) and applying federal procedural rules (which contain their own burdens of proof).

CONCLUSION

This Court should grant the instant petition to consider this matter further and determine that state substantive law rather than federal procedural law (Bankruptcy Rule 4003(c)) should govern the issue of the applicable burden of proving a claimed exemption. Alternatively, this Court should adopt a shift in burden standard applicable to Bankruptcy Rule 4003(c) and rule that property claimed as exempt is *prima facie* exempt until the presumption of validity is rebutted. Once an objection is filed and "persuasive" evidence is presented to rebut the presumption of validity, the burden should shift to the debtor to "produce" a preponderance of evidence to support allowance of the claimed exemption. Because the Courts below adopted an incorrect standard of proof under Bankrutpcy Rule 4003(c) their decisions should be reversed and remanded for further proceedings.

Respectfully submitted,
Bruce W. Akerly
Counsel of Record
BELL NUNNALLY & MARTIN LLP
3232 McKinney Avenue
Suite 1400
Dallas, Texas 75204
(214) 740-1430

Attorney for Petitioner

(any footnotes trail end of each document)

No. 07-10958
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

In The Matter Of: JOSEPH M FRIEDHEIM; JOYCE A FRIEDHEIM, Debtors;

THE CADLE COMPANY, Appellant

v.

JOSEPH M FRIEDHEIM; JOYCE A FRIEDHEIM, Appellees

April 29, 2008, Filed

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

COUNSEL: For CADLE CO, Appellant: Bruce William Akerly, Linda D Thai, Bell, Nunnally & Martin, Dallas, TX.

For JOSEPH M FRIEDHEIM; JOYCE A FRIEDHEIM, Appellees: Rosemary J Zine, Dallas, TX.

JUDGES: Before KING, WIENER, and ELROD, Circuit Judges.

OPINION

PER CURIAM: *

AFFIRMED. *See* 5TH Cir. R. 47.6. All outstanding motions are DENIED.

Footnotes

*Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

BANKRUPTCY CASE NO. 05-35210-HDH-7, CIVIL ACTION NO. 3:07-CV-0181-G

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS,
DALLAS DIVISION

IN RE: JOSEPH M. FRIEDHEIM and JOYCE A. FRIEDHEIM, Debtors.

THE CADLE COMPANY, Appellant,

vs.

JOSEPH M. FRIEDHEIM and JOYCE A. FRIEDHEIM, Appellees.

August 14, 2007, Decided

August 14, 2007, Filed

COUNSEL: For The Cadle Company, Appellant: Bruce W Akerly, LEAD ATTORNEY, Linda D Thai, Bell Nunnally & Martin, Dallas, TX.

For Joseph M Friedheim, Joyce A Friedheim, Appellees: Rosemary Jeanne Zyne, LEAD ATTORNEY, Law Office of Rosemary J Zyne, Dallas, TX.

Harlin D Hale, Bankruptcy Judge, US Bankruptcy Court, Dallas, TX.

JUDGES: A. JOE FISH, CHIEF JUDGE.

MEMORANDUM OPINION AND ORDER

This is an appeal by The Cadle Company ("Cadle," "the creditor," or "the appellant") from a final order of the bankruptcy court. Cadle challenges the bankruptcy court's decision that certain Individual Retirement Accounts ("IRAs") belonging to the debtors Joseph M. Friedheim and Joyce A. Friedheim (collectively "the Friedheims," "the debtors," or "the appellees") were exempt property not included in the bankruptcy estate. For the reasons stated below, the order of the bankruptcy court is affirmed.

I. BACKGROUND

The Friedheims filed a petition for relief under Chapter 7 of the Bankruptcy Code. Brief of Appellant The Cadle Company ("Appeal") at 4. On or about May 23, 2005, the debtors filed their schedules in the bankruptcy case; they amended the schedules on July 7, 2007. *Id.* Included in the amended schedules were four separate IRAs. *Id.* The Friedheims claimed that these IRAs were exempt property under TEX. PROP. CODE ANN. § 42.0021. *Id.*

Cadle timely objected to the schedule, alleging that the debtors' IRAs were neither properly funded nor qualified under applicable non-bankruptcy law. *Id.* at 5. Cadle later withdrew its objection that the IRAs were improperly funded. *Id.* Thus, the order from which Cadle appeals considered only whether the IRAs qualified as exempt property. *Id.*

On November 14, 2006, the bankruptcy court held a hearing on Cadle's objection to the scheduling of the

IRAs. *Id.* At that hearing, the bankruptcy court determined that Federal Rule of Bankruptcy Procedure 4003(c) governed the court's inquiry and thus held that the burden of proof was on Cadle to show, by a preponderance of the evidence, that the IRAs did not qualify as exempt property under applicable non-bankruptcy law. *Id.* at 5-6. At the hearing, the Friedheims called two witnesses, including one expert, besides themselves, to testify on their behalf. *Id.* at 6. At the conclusion of the hearing, the bankruptcy court ruled that Cadle had failed to satisfy its burden of proof. *Id.* In the alternative, the court held that [*3] if the burden of proof resided with the Friedheims, they had proven by a preponderance of the evidence that the IRAs were exempt. *Id.* at 9. This appeal followed.

II. ISSUES

This appeal presents two issues: (1) which party -- debtor or creditor -- had the burden of proof when Cadle objected to the Friedheims' claim that these IRAs were exempt property under Texas law, and what is the applicable standard of proof; and (2) if the bankruptcy court correctly determined the standard, was the bankruptcy court's ruling clearly erroneous? [1]

III. ANALYSIS

A. Jurisdiction

This court exercises jurisdiction over this bankruptcy appeal pursuant to 28 U.S.C. § 158(a)(1) and Federal Rule of Bankruptcy Procedure 8001. 28 U.S.C. § 158(a)(1); Bankruptcy Rule 8001.

B. Standard of Review

In reviewing a decision of the bankruptcy court, this court functions as an appellate court and applies the standards of review generally applied in federal court appeals. *Matter of Webb*, 954 F.2d 1102, 1103-04 (5th Cir. 1992); *Matter of Coston*, 991 F.2d 257, 261 n.3 (5th Cir. 1993) (en banc) (citing *Matter of Hipp, Inc.*, 895 F.2d 1503, 1517 (5th Cir. 1990)). Conclusions of law are reviewed *de novo. [*5] Matter of Herby's Foods, Inc.*, 2 F.3d 128, 131 (5th Cir. 1993). Findings of fact, on the other hand, whether based on oral or documentary evidence, are not to be set aside unless clearly erroneous, and due regard must be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses. *See* Bankruptcy Rule 8013; see also *Herby's Foods, Inc.*, 2 F.3d at 130-31. A finding is clearly erroneous "when although there is evidence to support it, the reviewing court on the entire evidence is left with a firm and definite conviction that a mistake has been committed." *Matter of Missionary Baptist Foundation of America*, 712 F.2d 206, 209 (5th Cir. 1983) (quoting *United States v. United States Gypsum Company*, 333 U.S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 746 (1948)). Mixed questions of law and fact are reviewed *de novo. Matter of National Gypsum Company*, 208 F.3d 498, 504 (5th Cir.), *cert. denied*, 531 U.S. 871, 121 S. Ct. 172, 148 L. Ed. 2d 117 (2000). The instant appeal involves both a question of law and a question of fact. Thus, the court will review the legal issue (who has the burden of proof with regards to a scheduled exemption and what standard of proof is necessary) under a *de novo* standard, and the factual question (whether a [*6] preponderance of the evidence was in favor of the debtors) under a clearly erroneous standard.

C. Standard for Exemptions in Bankruptcy Proceedings

Under 11 U.S.C. § 522, a debtor in bankruptcy can exempt certain property from the bankruptcy proceedings and protect that property from subsequent attempts to collect on antecedent debts. 11 U.S.C. § 522(c). Within § 522 is a list of various interests in property -- real and personal, tangible and intangible -- that a debtor can exempt. *See* § 522(d). The Bankruptcy Code authorizes a debtor to choose exemptions available under state law or to rely on the exemptions provided in § 522(d). *See* § 522(b)(2). In this case, the Friedheims elected the exemptions allowed by Texas state law. They scheduled the four IRAs at issue as exempt under TEX. PROP. CODE ANN. § 42.0021, which provides that retirement plans are exempt as long as they qualify under certain sections of the Internal Revenue Code.

Under TEX. PROP. CODE ANN. § 42.0021, a party claiming the exemption has the initial burden of demonstrating that the interest in question is of a type listed in § 42.0021. See *Lozano v. Lozano*, 975 S.W. 2d 63, 67 n.4 (Tex. App. -- Houston [14th Dist.] 1998, pet. denied). However, because § 42.0021 states that the interest is exempt "*unless* the plan, contract, or account does not qualify under the applicable provisions of the Internal Revenue Code of 1986," TEX. PROP. CODE ANN. § 42.0021 (emphasis added), the burden on the claimant ends with this minimal showi· g. See *Lozano*, 975 S.W. 2d at 67 n.4. The claimant need not "affirmatively prove that [the interest] qualifies under the [Internal Revenue Code]." *Id.;* see also *In re Jarboe*, 365 B.R. 717, 721-22 (Bankr. S.D. Tex. 2007) ("It is the

burden of the party claiming an exemption under § 42.0021 of the Texas Property Code to prove that he is entitled to it. But combined with the liberal rule of construction, evidence that an account is an IRA is sufficient to establish that it is exempt, unless evidence is presented that the IRA does not qualify for exempt treatment under the Internal Revenue Code.") (internal citations omitted). Neither the parties nor this court were able to find an articulation by the Texas state courts of the applicable standard of proof which must be met by the objecting party. That is, while *Lozano* makes clear that the burden is on the objecting party, it does not explain whether the burden is satisfied by a preponderance of the evidence or some more stringent standard.

While Texas state law may be silent on the subject, the Federal Rules of Bankruptcy Procedure give an indication of the applicable standard. FED. R. BANKR. P. 4003(b) allows a party to object to the debtor's claim of exemption. FED. R. BANKR. P. 4003(c) provides that "[i]n any hearing under [Rule 4003], the objecting party has the burden of proving that the exemptions are not properly claimed." For its part, the Fifth Circuit has not interpreted this standard. However, because several bankruptcy and district courts within the Fifth Circuit have applied this provision in the past, the court is not writing on a blank slate.

The court finds *In re Cole*, 205 B.R. 382 (Bankr. E.D. Tex. 1997), instructive on the applicable burdens of proof when an exemption is claimed. Exemptions claimed by the debtor are presumed valid until proven otherwise. *Id.* at 384-85; see *Pequeno v. Schmidt*, 307 B.R. 568, 584 (S.D. Tex. 2004), *aff'd*, 126 Fed. App'x 158

(2005); *In re Harrington*, 306 B.R. 172, 181 (Bankr. E.D. Tex. 2003) (merely claiming the exemption establishes a prima facie claim that the interest is exempt). [2] [*9] To overcome the presumption of exemption, the objecting party must provide evidence in rebuttal. See *In re Cole*, 205 B.R. at 384; *Pequeno*, 307 B.R. at 584. "When an issue is in doubt because of the proof provided and the Court would be required to speculate, the party upon whom the burden of proof ultimately rests must lose." *In re Cole*, 205 B.R. at 384. Other courts within the Fifth Circuit have held that the objecting party must support its objection by a preponderance of the evidence. See *In re Soza*, 358 B.R. 903, 906 (S.D. Tex. 2006).

In the instant case, Cadle urges the court to replace the standard applied by the various district and bankruptcy courts of the Fifth Circuit with a shifting burden of proof adopted by the Ninth Circuit. *See* Brief of Appellant at 14 (citing *In re Carter*, 182 F.3d 1027 (9th Cir. 1999)). Under this shifting burden standard, while the burden of persuasion rests at all times with the objecting party, the burden of production shifts between the debtor and the objecting party. The debtor must make an initial showing to demonstrate that the claimed exemption is qualified under the terms of the statutory exemption; the defendant then must offer some evidence in rebuttal of that evidence. Notably, Cadle does not offer a standard that must be met in order to consider the objecting party's showing to be sufficient rebuttal evidence. The ultimate burden of production then falls on the debtor to come forward with unequivocal evidence to demonstrate that the exemption is proper. The court is unpersuaded by Cadle's arguments in favor of adopting this new

standard. Rather the court will apply the plain meaning of FED. R. BANKR. P. 4003(c) and the Texas common law.

Once the Friedheims made their minimal showing that the IRAs in question were an interest of a type exempt under TEX. PROP. CODE ANN. § 42.0021, the burden was on Cadle to demonstrate that the IRAs were not exempt. Presumably, Cadle needed to satisfy its burden by a preponderance of the evidence. See *Grogan v. Garner*, 498 U.S. 279, 286, 111 S. Ct. 654, 112 L. Ed. 2d 755 (1991). Accordingly, the court finds that the bankruptcy court applied the proper legal standard for resolving the exemption issue. Thus, for Cadle to be successful on this appeal, it must prove that the factual determinations made by the bankruptcy court were clearly erroneous.

D. Review of Factual Findings for Clear Error

In the brief in support of its appeal, Cadle points to no evidence from the bankruptcy court record indicating clear error. In fact, Cadle points to no evidence in support of its contention that the IRAs in question did not qualify as exempt property under Texas state law. Rather, Cadle only directs the court to equivocations of the debtors' witnesses on the question of whether the IRAs are qualified. However, because the court concludes that the burden was on Cadle to prove by a preponderance of the evidence that the plans were not qualified, the witnesses' uncertainties do not rise to the level of evidence demonstrating that the IRAs did not qualify under TEX. PROP. CODE ANN. § 42.0021. In other words, testimony by the debtors and their witnesses that they are unsure whether the plans meet

the requirements of the Internal Revenue Code is not evidence that the plans do not meet the requirements of the Internal Revenue Code. Cadle directs the court to no testimony, documents, or other evidence in the record showing that it met its burden of proving, by a preponderance of the evidence, that these IRAs did not qualify as an exempt property. Accordingly, the bankruptcy court's decision that Cadle failed to meet its burden was not clearly erroneous.

III. CONCLUSION

For the above reasons, the bankruptcy court's order denying Cadle's objection is AFFIRMED.

SO ORDERED.

August 14, 2007.

A. JOE FISH

CHIEF JUDGE

Footnotes

1 Cadle also raises the issue of whether a court can make a ruling in the alternative as was done by the bankruptcy court in this case. It offers no legal authority to support its argument that such rulings are improper. Moreover, it has been the experience of this court that such rulings are both proper and efficient. The bankruptcy court's holding was internally consistent. The bankruptcy court found that the burden of proof rested with Cadle, which needed to prove, by a preponderance of the evidence, that the IRAs were not

qualified. By its terms, the preponderance of evidence standard requires that the party on whom the burden of proof lies to prove its position by more than 50 percent of the evidence. See Matter of Bell Petroleum Services, Inc., 3 F.3d 889, 909 (5th Cir. 1993) (Parker, J., concurring) ("Civil cases are decided by a preponderance of the evidence . . . . Evidence by 'fifty-one percent,' or to the extent of 'more likely than not,' is deemed sufficiently reliable . . ."). The bankruptcy court's alternative holding was analytically proper. Whether the burden was on the debtor or the creditor, the bankruptcy court found that more than 50 percent of the evidence weighed in favor of the debtors.

2 There is at least some indication that the debtor must do slightly more than schedule the interest as exempt. That is, as stated by the court in *Lozano*, the debtor must demonstrate that the interest is of a type for which the exemption is applicable. See *In re Foster*, 360 B.R. 210, 213-14 (Bankr. E.D. Tex. 2006) (citing *Lozano*, 975 S.W. 2d at 67).

11/14/2006

CASE NO. 05-35210-HDH-7 CHAPTER 7
IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:

JOSEPH M. FRIEDHEIM AND, JOYCE A. FRIEDHEIM, Debtors

THE CADLE COMPANY, Objecting Party

vs

JOSEPH M. FRIEDHEIM A. JOYCE A. FRIEDHEIM, Respondents

ORDER ON THE CADLE COMPANY'S OBJECTION TO DEBTORS' SCHEDULE C EXEMPTIONS

THIS CAUSE HAVING COME BEFORE THIS COURT on November 14, 2006, on The Cadle Company's Objection to Debtors' Schedule C Exemptions, and the Court, having considered the evidence presented and having heard the argument of counsel, it is ORDERED that.

1. Pursuant to previous Orders of this Court, The Cadle Company has withdrawn all of its objections to Debtors' Schedule C Exemptions except its objection that the Debtor Joseph Friedheim's Fidelity Investments Roth IRA in the scheduled amount of $230,065; and Co-Debtor Joyce Friedheim's Fidelity

Investments Roth IRA in the scheduled amount of 67,664, Fidelity Investments SIMPLE IRA in the scheduled amount of $63,083, and T.Rowe price Roth IRA in the scheduled amount of $63,063 are not qualified under applicable provisions of the Internal Revenue Code of 198

2. Pursuant to Federal Rule of Bankruptcy procedure 4003(c), the objecting party bears the burden of proving that the Debtors' exemptions are not properly claimed. The burden of proof is by a preponderance of the evidence; a more likely than not test. See In re Cole, 205 B.R. 382 (Bankr. E.D. TX 1997).

3. The Cadle Company has not met its burden of proof that the exemptions claimed regarding the four IRA's are not proper.

4. Alternatively, if the Court' reading of Federal Rule of Bankruptcy procedure 4003(c) and the case law is not correct, the question before the Court would be whether it is more likely than not that the IRA's are exempt under Texas and federal law based on the record made at the hearing. The testimony of the Debtors ties the documents to the IRA's at issue to this Court's satisfaction. All four IRA's are sold by reputable national firms. The testimony of Debtors' expert was persuasive. If the Debtors have the burden of proof, they have met it by a preponderance of the evidence.

5. To the extent that this ruling is reviewed by a higher court, the testimony of the Debtors, Andrea. Hundley, and William Smothermon was credible and

persuasive. This Court observed all four witnesses testify and it is convinced by a preponderance of the evidence that all four IRA's claimed by the Debtors as exempt are exempt.

END OF ORDER

101

FILED
AUG 21 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 08-133

IN THE
Supreme Court of the United States

THE CADLE COMPANY,

Petitioner,

v.

JOSEPH and JOYCE FRIEDHEIM,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

ROSEMARY J. ZYNE
5430 L. B. J. Freeway
Suite 1200
Dallas, Texas 75240
(214) 739-9119
(214) 739-2332 (Facsimile)

Attorney for Respondents

217750

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether the Fifth Circuit actually decided an important question of federal law when it *per curiam* affirmed without opinion the lower courts' decision which was decided on alternative grounds, and then determined that its affirmance not be published and be of no precedential value?

2. Whether this Court should grant review when the *Questions Presented* to this Court by Petitioner were never argued in the trial court and where Petitioner admitted in the trial court to a different burden of proof than argued to this Court?

3. Whether, if the Fifth Circuit did decide an important federal question, Petitioner has presented compelling reasons to grant the petition where even if this Court decided in favor of Petitioner, the ultimate outcome of the case would be the same and Petitioner would still lose?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF CITED AUTHORITIES iv

INTRODUCTION 1

STATEMENT OF THE CASE 6

REASONS FOR DENYING THE PETITION ... 9

1. Summary of Argument 9

   A. The Fifth Circuit did not decide an important question of federal law ... 9

   B. Petitioner waived its arguments by its admissions in the trial court and by its failure to argue them in the trial court 12

   C. Granting the writ would serve no practical purpose because the ultimate result would be the same no matter what the burden of proof applied 13

2. Argument 14

   A. Section 42.0021 17

Contents

Page

B. Federal Rule of Bankruptcy Procedure 4003(c) 18

C. The Burden of Proof Under Section 42.0021 Does Not Apply 20

D. Even if the Burden of Proof Under Texas Property Code Section 42.0021 Applied, the Friedheims still Prevail 22

E. The Court Should Not Adopt a Burden Shifting Standard Applicable to Bankruptcy Rule 4003(c) 26

CONCLUSION 30

TABLE OF CITED AUTHORITIES

Page

Cases:

In Re Barnes, 275 B.R. 889 (Bankr. E.D. Cal. 2002) 24

In re Carter, 182 F.3d 1027 (9th Cir. 1999) 28

In re Cole, 205 B.R. 382 (Bankr. E.D. Tex. 1997) 4, 16, 19, 26, 27

In re Foster, 360 B.R. 213 ..... 18, 19, 29

Grogan v. Garner, 498 U.S. 279 (1991) 21

In re Harrington, 306 B.R. 172 (Bankr E.D. Tex. 2003) 4, 16, 19

In re Hood, 319 F.3d 755 (6th Cir. 2003) 20

In re Lester, 141 B.R. 157 (S.D. Ohio 1991) 4, 16

Lozano v. Lozano, 975 S.W.2d 63 (Tex. App-Houston [14th Dist.] 1998) ..... *passim*

Matter of Swift, 129 F.3d 792 (5th Cir. 1997) ... 15, 27

In re Mauer, 268 B.R. 335 (Bankr. W.D.N.Y. 2001) 28

In re Orso, 283 F.3d 686 (5th Cir. 2002) 23

Cited Authorities

Page

Raleigh v. Illinois Dept. of Revenue, 530 U.S. 15 (2000) 20-21

Rucker v. Rucker, 810 S.W. 2d 793 (Tex. App.—Houston 14th Dist. 1994) 17, 18

Sommerville v. United States, 376 U.S. 909 (1964) (*cert. denied*) 29

Statutes:

11 U.S.C. § 522(b)(1) 14

11 U.S.C. § 522(b)(2) 14

11 U.S.C. § 522(d) 14

11 U.S.C. § 541(b) 1

11 U.S.C. § 541c(2) 1

Bankruptcy Code § 522 ..... 21, 22

Bankruptcy Code § 522(b) 1, 2, 21

Bankruptcy Code § 522(b)(1) 1

Bankruptcy Code § 522(b)(2) 1, 2

Bankruptcy Code § 522(d) 1

Page

Texas Property Code § 42.0021 ..... 4, 8, 16, 17, 19, 24

Texas Property Code § 42.0021(a) 22, 24

Rules:

Bankruptcy Rule 4003 2

Bankruptcy Rule 4003(a) 2, 6

Bankruptcy Rule 4003(b) 2

Bankruptcy Rule 4003(c) ..... *passim*

5TH CIR. R. 47.5.4 ..... 9, 11

5TH CIR. R. 47.6 11

Sup. Ct. R. 10 ..... 1, 11

INTRODUCTION

Petitioner has presented no compelling reasons for its Petition for a Writ of *Certiorari* to be granted ("Petition"). *See* Sup. Ct. R. 10. Specifically, Petitioner (1) fails to demonstrate that the Fifth Circuit Court of Appeals decided an important question of federal law, (2) fails to demonstrate that Petitioner did not waive its arguments now presented to this Court when it failed to make those arguments in the trial court and where it actually admitted to a different burden of proof in the trial court, and (3) fails to demonstrate that even if Petitioner succeeded before this Court that the ultimate outcome of the case would be any different.

Therefore, the Petition should be denied.

Pursuant to 11 U.S.C. § 541(b), when an individual files for bankruptcy protection, all of his real and personal property becomes property of the bankruptcy estate, except for certain property excepted under §§ 541(b) and c(2). Bankruptcy Code § 522(b) states that notwithstanding § 541 discussed above, an individual debtor may exempt from property of the estate the property listed in either § 522(b)(1); i.e., specific property itemized in § 522(d)—commonly referred to as "the federal exemptions"; or, in the alternative, under § 522(b)(2); i.e., any property that is exempt under federal law other than § 522(d) or state or local law of the place where the debtor is domiciled—commonly referred to as "the state exemptions".

Pursuant to Bankruptcy Rule 4003(a), the Debtor must list the property claimed as exempt on his schedule of assets. Pursuant to Bankruptcy Rule 4003(b), a creditor may file objections to the list of property claimed as exempt. Pursuant to Bankruptcy Rule 4003(c), in *any* hearing under Bankruptcy Rule 4003, the objecting party has the burden of proof that the exemptions are not properly claimed and the Bankruptcy Court shall hear the objection upon notice.

In quoting Bankruptcy Rule 4003(c) in its *Questions Presented* to this Court, Petitioner omits the crucial clause of the Rule—that the objecting party has the burden of proof ***in any hearing on objection to exemptions***. It is clear from this clause that **all** objections to exemptions, whether claimed pursuant to Bankruptcy Code § 522(b)(1); i.e., "the federal exemptions"; or whether claimed pursuant to Bankruptcy Code § 522(b)(2); i.e., "the state exemptions"; shall be heard by the Bankruptcy Court and that the objecting party has the burden of proof. Accordingly, Petitioner's *Questions Presented* are inaccurate and misleading when Petitioner omits this clause and states that "Bankruptcy Rule 4003(c) does not define the applicable burden of proof; does not state whether such burden is applicable when debtor elects the state exemptions; and does not address the effect when a debtor claims the state exemptions and the burden of proof under state law differs from that prescribed under Bankruptcy Rule 4003(c)." Petition at i. Under the plain meaning of Bankruptcy Rule 4003(c), the burden of proof is on the objecting party "in any hearing" whether the state or federal exemptions are claimed under Bankruptcy Code § 522(b).

Petitioner also fails to point out in its *Questions Presented* that Petitioner admitted in the Bankruptcy Court that Bankruptcy Rule 4003(c) applied to the case at hand and that Petitioner at all times carried the burden of persuasion under Bankruptcy Rule 4003(c) to prove that the exemptions were improperly claimed. Petitioner never argued in the Bankruptcy Court that Bankruptcy Rule 4003(c) did not apply when the state exemptions are claimed under the Bankruptcy Code. Petitioner simply asked the Bankruptcy Court to use its "leeway" to assign the burden of production to the Respondents and the burden of persuasion to Petitioner (which it admitted the objecting party at all times carried). Petitioner never argued to the Bankruptcy Court that a state court burden of proof should apply. Therefore, Petitioner waived these arguments.

Petitioner also fails to point out in its *Questions Presented* that not only did the Bankruptcy Court rule that Petitioner had the burden of proof under Bankruptcy Rule 4003(c) and that it failed to meet its burden, but that the Court ruled in the alternative that even if the Respondents had the burden of proof, that they met their burden by a preponderance of credible and persuasive evidence. Accordingly, no matter what and to whom the burden of proof was assigned, the result would be the same – the Respondents would prevail. The District Court affirmed the Bankruptcy Court's decision. The District Court ruled that not only was the Bankruptcy Court correct in assigning the burden of proof to Petitioner, but that its ruling in the alternative was analytically proper and that whether the burden was on the debtor or the creditor, the Bankruptcy Court found that more than 50 percent of the evidence weighed in favor of the Respondents.

Petitioner also fails to point out in its *Questions Presented* that the Fifth Circuit Court of Appeals *per curiam* affirmed the above decisions without opinion and specifically determined that its decision should not be published and that it had no precedential value. This could hardly be interpreted as the Fifth Circuit's deciding an important issue of federal law and, therefore, Petitioner has not presented any compelling reason why this Court should grant its petition.

In addition, Petitioner's first issue presented (which burden of proof applies when state law and bankruptcy law burdens of proof differ) makes it appear that there is a different burden of proof under state law and under Bankruptcy Rule 4003(c). As is discussed in detail in the brief herein, there is no material difference between the Bankruptcy Rule 4003(c) burden of proof and the Texas Property Code § 42.0021 retirement exemption burden of proof, and, therefore, there is no compelling reason for the Court to grant the petition. Under both longstanding bankruptcy and Texas law, the debtor must only show that the property claimed as exempt under Texas Property Code § 42.0021 is "of a type" described in that section. Once the debtor has met that minimal burden, the objecting party must prove that the exemption is not properly claimed. *Lozano v. Lozano*, supra; *In re Cole*, 205 B.R. 382 (Bankr. E.D. Tex. 1997), and *In re Harrington*, 306 B.R. 172, 181 (Bankr E.D. Tex. 2003), *In re Lester*, 141 B.R. 157, 162 (S.D. Ohio 1991). Since there is no material difference in the burdens of proof, there is no compelling reason for the Court to grant the Petition since the ultimate outcome

of the case would be the same and Petitioner would still lose.[1]

Also, even if the burden of proofs were different under state and bankruptcy laws, the ultimate outcome of the case would still be the same because the Bankruptcy Court ruled in the alternative that even if the Respondents had the burden of proof, they met it by a preponderance of the evidence. (Pet. App. 14a-15a).

Finally, Petitioner's second issue presented [whether a burden-shifting requirement should be read into Bankruptcy Rule 4003(c)] is also not a compelling reason for the Court to grant the Petition since longstanding bankruptcy law makes clear that the debtor has only a minimal burden of showing that the asset claimed as exempt is of a type for which the exemption is applicable and that it is the objecting party's burden to prove that the property does not qualify as exempt.

Accordingly, Petitioner has not presented any compelling reasons for this Court to grant the writ and the Petition should be denied.

---

1. Petitioner misstates in its *Questions Presented* that the Debtor is uniquely in possession of evidence to support the exemption. Petitioner points to nothing to support this statement. Generally, the majority of the evidence presented by Debtors to support their position that their IRAs are exempt under the Internal Revenue Code are documents from the companies that manage the IRAs and from the IRS; and thus not "uniquely in possession of the Debtors".

STATEMENT OF THE CASE

Respondents/Debtors, Joseph Friedheim and Joyce Friedheim, ("Debtors/Friedheims") ages 76 and 70 respectively, filed for Chapter 7 bankruptcy protection in May, 2005. Pursuant to Bankruptcy Rule 4003(a), the Friedheims listed in their bankruptcy schedules certain items of property which they claimed as exempt from the bankruptcy estate, including all of their household goods and furnishings, a New York Life Insurance Company annuity, and four Individual Retirement Accounts (IRAs)—two Fidelity Investment Roth IRAs, a Fidelity Investment Simple IRA, and a T. Rowe Price IRA which was a rollover from Joyce Friedheim's 401k with her former employer.

Without requesting any documents or other information from the Friedheims regarding the validity of these exemptions, Petitioner, The Cadle Company ("Cadle") summarily filed objections to almost every item of personal property claimed as exempt by the Friedheims. Only after these objections were filed did Cadle conduct any discovery and begin requesting documents from the Friedheims in an attempt to support its objections—even though under Bankruptcy Rule 2004, creditors can conduct a pre-objection examination of the debtors to determine if an objection is warranted. The Friedheims produced volumes of documents in response to these requests. Upon demand by the Friedheims, after over a year of legal wrangling, Cadle ultimately withdrew its objections to all of the Friedheims' household goods and furnishings and the Friedheims decades-old annuity. However, Cadle refused to withdraw its objections to the IRAs, stating only that

the documents produced by the Friedheims do not definitively show that the IRAs are qualified under the Internal Revenue Code of 1986. ("IRC").

At the evidentiary hearing on the objections, Cadle admitted that it, as the objecting party, had at all times the burden of persuasion pursuant to Bankruptcy Rule 4003(c), but asked the Bankruptcy Court to use its "leeway" to assign the burden of production to the Friedheims. The Bankruptcy Court ruled that Cadle had the burden of proof pursuant to Bankruptcy Rule 4003(c).

At the hearing, Cadle was unable to put forth any evidence that the IRAs were not qualified under the IRC and put on no expert witness to support its claim that the IRAs were not IRC qualified.

The Friedheims, on the other hand, identified each of their IRAs from the volumes of documents they produced, and showed that the documents qualified under the Internal Revenue Code of 1986. This was further supported by the testimony of their expert witness.

Based on the total lack of evidence to support Cadle's objection that the IRAs were not qualified under the IRC, the Bankruptcy Court ruled that Cadle did not meet its burden of proof by a preponderance of the evidence and overruled Cadle's objection to exemptions. The Court further found that even if the Friedheims had the burden of proof, that they had met their burden by a preponderance of the evidence that the exemptions should be allowed.

On appeal, the District Court correctly applied the plain meaning of Fed. R. Bankr. P. 4003(c) and the Texas common law in affirming the Bankruptcy Court's decision that Cadle had the burden of proof by a preponderance of the evidence that the IRAs do not qualify under the IRC and that it failed to meet that burden.

The District Court noted that based on both federal and state law, once the Debtors make their minimal showing that the IRAs are an interest of a type exempt under Texas Property Code § 42.0021, the burden is on the objecting party, pursuant to Fed. R. Bankr. P. 4003(c) and Texas Property Code § 42.0021, to demonstrate that the IRAs are not exempt. The District Court recognized that Texas courts have not articulated the "applicable standard of proof which must be met by the objecting party," that is, "whether the burden is satisfied by a preponderance of the evidence or some more stringent standard." The Court, however, observed that Cadle did not offer a standard that must be met in order to consider the objecting party's showing to be sufficient rebuttal evidence. The Court also pointed out that Cadle failed to direct the Court to any testimony, documents, or other evidence in the record showing that it met its burden that the IRAs did not qualify under the Internal Revenue Code. Cadle did not ask the Court to make an *Erie* guess as to what the Texas courts would do or to certify the question to the Texas Supreme Court. And the District Court did not need to do so because it was clear from the plain meaning of § 42.0021 and Texas common law that once the Friedheims made a showing that the asset was of the type exempt under the statute, Cadle had the burden of proving that the asset was not qualified under the IRC.

The District Court also found that the Bankruptcy Court's alternative holding was proper, i.e., whether the burden was on the debtor or the creditor, the Bankruptcy Court found that more than 50 percent of the evidence weighed in favor of the debtors.

In a *per curiam* ruling, the Fifth Circuit affirmed without opinion. The Circuit Court determined that its ruling should not be published and that it is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4. Accordingly, there was no decision by the Fifth Circuit on an important question of federal law as alleged by Petitioner.

REASONS FOR DENYING THE PETITION

1. Summary of Argument

A. The Fifth Circuit did not decide an important question of federal law

This Court should not grant review when the Fifth Circuit did not decide an important question of federal law that has not been, but should be, settled by this Court.

Cadle asserts as its only reason why this Court should issue a Writ of *Certiorari* to review the judgment and decision of the Fifth Circuit is "because that decision decided an important question of federal law that has not been, but should be, settled by this Court." The Fifth Circuit, however, did not decide an important question of federal law. The Bankruptcy Court entered its unpublished *Order on The Cadle Company's Objection*

to Debtors' Schedule C Exemptions, holding that pursuant to Bankruptcy Rule 4003(c), Cadle, as the objecting party on the objection to exemptions of the Friedheims' Individual Retirement Accounts (IRAs), had the burden of proving that the Friedheims' exemptions are not properly claimed and that Cadle did not meet that burden. (Pet. App. 14a). The Court alternatively held that even if the Friedheims had the burden of proof, they have met it by a preponderance of the evidence. (Pet. App. 14a).

The District Court affirmed the Bankruptcy Court's decision by applying the plain meaning of Fed. R. Bankr. P. 4003(c) and the Texas common law, both of which state that once the Debtor makes his minimal showing that the IRAs in question are an interest *of a type* exempt under Tex. Prop. Code Ann. § 42.0021, the burden is on the objecting party to demonstrate that the IRAs are not exempt. (Pet. App. 7a-8a). The District Court observed that Cadle points to no evidence in support of its contention that the IRAs in question do not qualify as exempt property under Texas law and that Cadle failed to direct the court to any testimony, documents, or other evidence in the record showing that it met its burden of proving that the IRAs do not qualify as exempt property. (Pet. App. 10a-11a). The District Court also found that the Bankruptcy Court's alternative holding was proper, i.e., whether the burden was on the debtor or the creditor, the Bankruptcy Court found that more than 50 percent of the evidence weighed in favor of the debtors. (Pet. App. 11a).

In a *per curiam* ruling, the Fifth Circuit affirmed without opinion. The Circuit Court determined that its ruling should not be published and that it is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4. (Pet. App. 1a-2a). Pursuant to 5TH CIR. R. 47.6, a judgment may be affirmed without opinion

> when the court determines that an opinion would have no precedential value and that any one or more of the following circumstances exists and is dispositive of a matter submitted for decision: (1) that a judgment of the district court is based on findings of facts that are not clearly erroneous; . . . and (5) no reversible error of law appears.

Accordingly, there was no decision by the Fifth Circuit on an important question of federal law. The Circuit Court simply affirmed the lower courts' decision that if the burden of proof were on the objecting party, Cadle did not meet its burden; or, alternatively, if the burden of proof were on the party claiming the exemption, the Friedheims met their burden. Therefore, Cadle has failed to demonstrate any compelling reason why Cadle's Petition for Writ of Certiorari should be granted. *See* Sup. Ct. R. 10.

B. Petitioner waived its arguments by its admissions in the trial court and by its failure to argue them in the trial court

This Court should not grant review when the *Questions Presented* to this Court by Petitioner were never argued in the trial court and where Petitioner admitted in the trial court to a different burden of proof than argued to this Court.

As stated above, Petitioner has failed to show that the Circuit Court decided the burden of proof issue, but even if it is determined that it did so by its silence, there is still no compelling reason to grant the petition because Petitioner waived its arguments by failing to timely raise them. In the Bankruptcy Court, the only issue presented regarding burden of proof was whether there was a shifting burden of proof under Bankruptcy Rule 4003(c) which would give the Debtor the burden of production and the objecting party the ultimate burden of persuasion. There was no issue raised in the Bankruptcy Court regarding defining the applicable burden of proof under Bankruptcy Rule 4003(c); whether the burden of proof under § 4003(c) is applicable when a debtor elects state exemptions; and the effect when the debtor claims state exemptions and the burden of proof under applicable state law differs from that prescribed under Bankruptcy Rule 4003(c). In fact, the Petitioner admitted in the Bankruptcy Court that it had the ultimate burden of persuasion under Bankruptcy Rule 4003(c). The parties proceeded in the Bankruptcy Court pursuant to Bankruptcy Rule 4003(c). Cadle waived these arguments and this Court should not grant review.

C. Granting the writ would serve no practical purpose because the ultimate result would be the same no matter what the burden of proof applied.

Petitioner has not presented compelling reasons to grant the petition since review by this Court would have no practical effect in this case because even if this Court decided in favor of Petitioner, the ultimate result in this case would be the same and Petitioner would still lose.

Even if the Bankruptcy Court applied an incorrect burden of proof, certification may be denied where resolution of the conflict would be irrelevant to the ultimate outcome of the case. Even if the Texas burden of proof propounded by Petitioner were applied instead of the Bankruptcy Rule 4003(c) burden of proof applied by the trial court, the ultimate outcome would be the same. As discussed in more detail in the argument below, under Texas Property Code § 42.0021 the debtor must only show that the asset claimed as exempt is of the type listed in the exemption statute. Once the debtor meets that minimal showing, the objecting party has the burden of proving that the IRA does not qualify under the IRC. *Lozano v. Lozano*, 975 S.W.2d 63, 67 (Tex. App-Houston [14th Dist.] 1998). In the case before the Court, once the Friedheims established that the assets claimed as exempt were of the type, i.e., IRAs, listed in the exemption statute, Cadle had to prove that they did not qualify under the IRC, which the Bankruptcy Court found Cadle failed to do. And, even if Cadle's argument is correct that the Friedheims carried the burden of proving that the exemptions were properly claimed, the Bankruptcy Court found, in the alternative, that the

evidence presented by the Friedheims was credible and persuasive and that, if the Friedheims had the burden of proof, they met their burden by a preponderance of the evidence. Accordingly, review by this Court would have no practical effect, because under all circumstances, Cadle loses.

2. Argument

Cadle starts out its *Summary of Argument* with a statement that discharge is a privilege not a right. "Discharge" has nothing to do with the issues before this Court. The issues relate to "exemptions" and who has the burden of proof on objections to claimed exemptions.

When a debtor files for bankruptcy protection, he can claim as exempt pursuant to 11 U.S.C. § 522(b)(1), property that is specified in 11 U.S.C. § 522(d) or, he can claim as exempt pursuant to 11 U.S.C. § 522(b)(2), property that is specified under other federal law or under state or local law. Pursuant to Bankruptcy Rule 4003(a), the debtor is required to list the property claimed as exempt on his schedule of assets. Pursuant to 4003(b), a creditor may file objections to the list of property claimed as exempt. Pursuant to 4003(c), in ***any*** hearing under Bankruptcy Rule 4003, the objecting party has the burden of proof that the exemptions are not properly claimed. The rule does not distinguish between the federal exemptions claimed pursuant to § 522(b)(1) and the state exemptions claimed pursuant to § 522(b)(2).

Cadle argues that the debtor is uniquely in possession of facts and other evidence to support the exemption and therefore should be assigned the initial burden of production, but points to no facts to support this contention And its argument that creditors lack the resources to obtain such documentation is equally unsound. It is the rare bankrupt debtors who have more resources than the creditors pursuing them. Congress understood that when it enacted Fed. R. Bank. P. 4003(c) requiring the objecting party to bear the burden of proving that the exemptions were not properly claimed. Otherwise, trustees and creditors such as Cadle would flood the Courts with meritless objections to exemptions and force the already insolvent debtors to spend extensive time and money defending an exemption claim which is rightfully given to them by law and which the law clearly favors. Many debtors would by default succumb to the pressures of these predatory creditors and would lose the exemptions that the legislatures explicitly wanted them to retain as "vital to their continued existence." *See Matter of Swift*, 129 F.3d 792 (5th Cir. 1997)

If Cadle here, when it believed that Bankruptcy Rule 4003(c) placed the burden of persuasion on the objecting party, filed objections to all of the Friedheims' household goods and furnishings, annuity, and IRAs without any evidence to support its objections, one can only imagine what objections it would file if this Court required a different burden of proof.

At the hearing on the Objection to Exemptions, Cadle's counsel admitted at the outset that Bankruptcy Rule 4003(c) was controlling in the case and that "[Cadle]

understand[s], in this particular instance where we're objecting to exemptions, that we have the burden of persuasion on that issue (of whether the IRAs do not qualify under the IRC)" and that the burden of persuasion "always remains on the Objector." R. 6:883-884. It never argued at trial that a state law burden should apply or that the state law conflicted with Bankruptcy Rule 4003(c), and therefore, waived that argument. In fact, there is no evidence that the two decade-old laws conflict. Texas Property Code § 42.0021 and Bankruptcy Rule 4003(c) and the case law following them require only a minimal showing by the debtor that the asset claimed as exempt is of a type identified in the exemption statute and place the ultimate burden of persuasion on the objecting party. *Lozano v. Lozano*, supra; *In re Cole*, 205 B.R. 382 (Bankr. E.D. Tex. 1997), and *In re Harrington*, 306 B.R. 172,181 (Bankr E.D. Tex. 2003), *In re Lester*, 141 B.R. 157, 162 (S.D. Ohio 1991). Cadle repeatedly argued throughout its appeals that once an objection is filed and "persuasive" evidence is presented to rebut the presumption of validity, the burden should shift to the debtor to produce a preponderance of evidence to support allowance of the claimed exemption. What Cadle refuses to accept is that the Bankruptcy Court found that Cadle did not present persuasive evidence to rebut such a presumption, and in fact, as the District Court observed, pointed to ***no*** evidence that the IRAs did not qualify as exempt. (Pet. App. 14a). What Cadle further refuses to accept is that the Bankruptcy Court also found that even if the Friedheims had the burden of proof, they met that burden by a preponderance of the evidence. (Pet. App. 14-15a).

A. Section 42.0021

In its "Statement" to this Court, Petitioner deceptively misstates what Texas Property Code § 42.0021 provides. It does *not* provide—as Petitioner asserts—that IRAs qualify as exempt from claims of creditors "if" they qualify under the applicable provisions of the Internal Revenue Code. The Texas Property Code provides that a person's right to the assets in an IRA **are exempt** *unless* the account does not qualify under the applicable provisions of the Internal Revenue Code of 1986. This is a critical distinction which the Texas Court of Appeals made in determining burden of proof under the IRA exemption statute and which was argued extensively in both parties' briefs in the lower courts. In the 1998 Texas Appellate Court decision of *Lozano v. Lozano*, supra, the Court stated that, under the plain meaning of § 42.0021, evidence that an account is an IRA is sufficient to establish that it is exempt *unless* evidence is presented **by the objecting party** that the IRA does not qualify for such treatment under the Internal Revenue Code. The *Lozano* Court specifically overruled its prior 1991 opinion in *Rucker v. Rucker*, 810 S.W. 2d 793 (Tex. App.—Houston 14th Dist. 1994) (which Cadle discusses for two full pages in its Petition to this Court as its authority for its assertion that the debtor has the burden of proving entitlement to the exemption). The *Lozano* Court stated in a footnote that, contrary to *Rucker*, "we believe that the plain meaning of this language imposes a burden upon the debtor to show only that the plan or account is of a type listed in that section, but not to also affirmatively prove that it qualifies under the IRC." *Id.* Notably, petition for review

in the *Lozano* case was denied. *Lozano* was decided ten years ago and there has been no Texas decision to the contrary since. Accordingly, Cadle's statement, relying on the overruled case of *Rucker*, that "[u]nder Texas law, a debtor claiming an account exemption under Section 42.0021 must show that the account qualified under the IRC," is simply a knowing misstatement of current Texas law.

B. Federal Rule of Bankruptcy Procedure 4003(c)

Cadle begins its argument regarding the burden of proof under Bankruptcy Rule 4003(c) by stating that

> [e]xperience demonstrates, that, when an objection to exemption is filed, especially where the exemption is based on state law, bankruptcy courts tend to ignore the burden of proof required under state law regarding the claimed exemption focusing instead on the burden of proof expressed in Rule 4003(c) of the Federal Rules of Bankruptcy Procedure.

(Pet. at 10). Cadle, however, cites no cases and points to no facts which would support this statement.

Cadle cites the Bankruptcy Court decision of *In re Foster*, for the proposition that the debtor has the initial burden of production to establish that the referenced property qualifies for the claimed exemption before the objecting party is obligated to go forward with his proof. *In re Foster*, 360 B.R. at 213-14. *Foster* is consistent with the holding in the case before this Court. The Court in *Foster* held that Rule 4003(c) governed objections to exemptions and that the debtor had to make an initial showing that he was entitled to the exemption.

The Debtors in this case did make an initial showing that they were entitled to the exemptions. The debtors established that the assets claimed as exempt are Roth and SIMPLE IRAs which are of a type exempt under § 42.0021(a) *unless* the creditor can prove that they do not qualify under the Internal Revenue Code of 1986.[2] R. 6:897-898, R. 6:889, R. 3:307-R. 5:878.

The Bankruptcy and District Courts in the 5th Circuit are consistent in their rulings on the issue of burden of proof with regard to objections to exemptions under the Bankruptcy Code. All hold that the Debtor must sustain a minimal burden of going forward with the evidence to establish that the property qualifies for the particular exemption. *Harrington*, *supra* at 181, *Patterson*, *supra* at 240, *In re Cole*, *supra* at 384-385. Once the Debtor meets that minimal burden, "the exemptions claimed by debtors are presumed valid until proven otherwise."

The Debtors in the case at hand made their minimal showing that the IRAs are an interest of a type exempt under § 42.0021, (in fact, as Cadle agreed, this issue was not in dispute)[3] and, once they did so, the burden was on Cadle to demonstrate that the IRAs claimed as exempt by the Debtors did not qualify under applicable

2. It should be noted that *Foster* dealt with a different exemption statute—one regarding annuities—which does not state on its face, as does the IRA statute before this Court, that the property ***is exempt unless*** it does not qualify.

3. Cadle admits in its brief before the District Court that "[t]he fact that Debtors claimed the IRAs and the documents related to the IRAs was not an issue that was in particular dispute." R. USCA 5 49.

provisions of the Internal Revenue Code of 1986. There is nothing in Bankruptcy Rule 4003(c) that would remotely indicate that Congress intended to impose a shifting burden of proof. Under the plain meaning analysis mandated by this Court, pursuant to 4003(c) the objecting party has the burden of proof on objections to exemptions.

C. The Burden of Proof Under Section 42.0021 Does Not Apply

Cadle for the first time in its brief to the Fifth Circuit argued that the District Court should have conducted a legal analysis under the *Erie* doctrine to determine whether state substantive law rather than federal procedural law governed the issue of burden of proof. Cadle never asked the Bankruptcy Court or the District Court to conduct such an analysis Rather, Cadle admitted in its hearing brief to the Bankruptcy Court, in its argument before the Bankruptcy Court, and in its brief to the District Court that at all times Cadle carried the ultimate burden of persuasion on the objection to exemptions. R. 6:883-884. It never asked the Court to conclude that Texas substantive law on the issue of burden of proof applied. It merely asked the Court to put the initial burden of production on the Debtors. By failing to raise this argument in the Bankruptcy Court and in the District Court, Cadle waived the argument. *See In re Hood*, 319 F.3d 755 (6th Cir. 2003).

Further, this Court stated that *in the absence of modification expressed in the Bankruptcy Code*, the burden of proof in an objection to claim in bankruptcy would remain where the substantive law puts it. *Raleigh*

v. Illinois Dept. of Revenue, 530 U.S. 15, 26 (2000). This Court makes clear that "Congress, of course, may do what it likes with entitlements in bankruptcy . . ." *Raleigh at* 21. Unlike the claims in *Raleigh* and the other cases cited by Cadle, the exemptions herein were claimed pursuant to § 522(b) of the Bankruptcy Code. Congress, in Bankruptcy Rule 4003(c), expressly modified the burden of proof in proceedings on objections to exemptions claimed under § 522 of the Bankruptcy Code to place the burden of proof squarely on the objecting party.[4]

Bankruptcy Rule 4003(a) provides that:

> **Claim of Exemption.** A debtor shall list the property claimed as exempt under § 522 of the Code on the schedule of assets required to be filed by Rule 1007. . . .

Bankruptcy Rule 4003(b) provides that:

> **Objections to Claim of Exemptions.** The trustee or any creditor may file objections to the list of property claimed as exempt within 30 days after the conclusion the meeting of creditors held pursuant to Rule 2003(a). . . .

---

4. *See also Grogan v. Garner*, 498 U.S. 279 (1991) where clearly the state law burden of proof did not apply in the bankruptcy case when Congress delineated its own burden of proof in the Bankruptcy Rules.

Bankruptcy Rule 4003(c) provides that:

> **Burden of Proof.** In ***any*** hearing under this rule, the objecting party has the burden of proving that the exemptions are not properly claimed. *Emphasis added.*

Accordingly, state law does not apply to the burden of proof on objections to exemptions claimed pursuant to § 522 of the Bankruptcy Code, and the Bankruptcy Court and District Court correctly applied the plain meaning of Rule 4003(c) in holding that Cadle, the objecting party, had the burden of proof.[5]

D. Even if the Burden of Proof Under Texas Property Code Section 42.0021 Applied, the Friedheims still Prevail

Cadle in this case makes much ado about nothing because, as discussed previously, even if the state law burden of proof propounded by Cadle applies, the Friedheims still win. Section 42.0021(a) of the Texas Property Code provides that a person's right to the assets in an IRA **are exempt** *unless* the account does not qualify under the applicable provisions of the Internal Revenue Code of 1986.

---

5. Cadle claims in a footnote that the Fifth Circuit has adopted the *Erie* decision and other decisions of this Court regarding burdens of proof, but because in the case at hand the Fifth Circuit simply affirmed the decisions of the courts below, *per curiam*, it appears that the Court chose not to follow them in the instant case. Cadle, of course, has no support for such an allegation. For the reasons stated in the brief herein, the Circuit Court found no reversible error in the decisions below and affirmed without opinion.

The Order on Motion to Dismiss Objection to Schedule C Exemptions, which was Approved as to Form by Cadle and is now a final order, clearly states that the only remaining objection to exemptions is that the above-described IRAs ***"do not qualify under the applicable provisions of the Internal Revenue Code of 1986."***—the exact language extracted from subsection (a) of § 42.0021. The IRAs are described in the Order as: Fidelity Roth IRA in the scheduled amount of $67,664; Fidelity Roth IRA in the scheduled amount of $230,065; T. Rowe Price Roth IRA in the scheduled amount of $63,063; and SIMPLE IRA in the scheduled amount of $63,083. R. 2:160-162, R. 7:1069-1070, R. 1:24-25.

Courts are in agreement that in determining the validity of an exemption claim under state law, courts should apply the plain wording of the statute. *See In re Orso*, 283 F.3d 686, 693 (5th Cir. 2002). As the *Lozano* Court stated, under the plain meaning of § 42.0021, evidence that an account is an IRA is sufficient to establish that it **is exempt *unless*** evidence is presented by the **objecting party** that the IRA does not qualify for such treatment under the Internal Revenue Code. *Lozano v. Lozano*, supra at 63, 67. Here, the individual retirement accounts are presumed exempt unless the Objecting Party – who also carries the burden of proof on the objection to exemptions –can show that the IRAs do not qualify under the applicable provisions of the Internal Revenue Code. Id. The Bankruptcy Court's order on the Motion to Dismiss Objection to Exemptions, which Cadle signed off on, describing the four accounts as IRAs and holding that the only remaining objection tracked the ***"unless the plan, contract, or account does not qualify under the applicable provisions of the Internal Revenue Code of 1986"*** part of the exemption; along with the volumes of

documents admitted into evidence by the Debtors to support their IRA claims[6]; the Debtors' and their expert witness's testimony establishing that the four accounts are IRAs, the forms of which were approved by the IRS; show that the accounts are of a type (Individual Retirement Accounts) listed in 42.0021(a) and therefore the accounts are presumed exempt unless Cadle could prove that they do not qualify under the IRC. Whether the accounts claimed as exempt were IRAs was never in issue.[7] The only remaining objection tracked the "***unless the plan, contract, or account does not qualify under the***

---

6. Cadle cites *In Re Barnes*, 275 B.R. 889 (Bankr. E.D. Cal. 2002) for the first time before this Court for the proposition that if the state exemption law places the burden of proof on the debtor, the debtor must produce the actual documents which provide the basis for the account claimed to be exempt in order to retain the exemption. First, this is a California Bankruptcy Court decision dealing with California exemption laws. Under Texas Property Code 42.0021 only requires the debtor to show that the asset is of the type listed in the statute and that the objecting party has the burden to prove the asset does not qualify under the IRC. *Lozano v. Lozano, supra.* Further, Cadle has cited no cases supporting the position that under Texas law, the debtor must produce the actual documents which provide the basis for the account claimed as exempt, nor did Cadle raise this issue in the Bankruptcy Court, the District Court, or the Court of Appeals. Second, the Bankruptcy Court in the case at hand found that if the Friedheims had the burden of proof, the evidence presented by the Friedheims met the burden of proof by a preponderance of the evidence. The decision was affirmed by both the District Court and the Circuit Court.

7. Cadle even admits in its brief before the District Court that "[t]he fact that Debtors claimed the IRAs and the documents related to the IRAs was not an issue that was in particular dispute." R. USCA5 49.

applicable provisions of the Internal Revenue Code of 1986" part of the exemption, and it is clear from the Texas Appellate Court decision in *Lozano* that Cadle had the burden on that issue under Texas law.

It is also clear that the Bankruptcy Court ruled in the alternative, that even if the Friedheims had the burden of proof, they have met it by a preponderance of the evidence based on the record made at the hearing. The Court found that the testimony of the Friedheims tied the documents to the IRAs at issue to the Court's satisfaction; that all four IRAs are sold by reputable national firms; that the testimony of Friedheims' expert was persuasive; and that the testimony of the Friedheims and their two witnesses was credible and persuasive and that the Court was convinced by a preponderance of the evidence that all four IRAs claimed by the Debtors as exempt are exempt. Thus, no what burden of proof is assigned or to whom it is assigned, Cadle still loses.

The District Court and the Fifth Circuit affirmed because they found no reversible error. Accordingly, the ultimate outcome of this case would be the same no matter what the burden—Respondents would prevail.

E. The Court Should Not Adopt a Burden Shifting Standard Applicable to Bankruptcy Rule 4003(c)

Cadle again fails to demonstrate any compelling reason why this Court should even consider whether to adopt a burden shifting standard pursuant to Bankruptcy Rule 4003(c). Cadle questions what type of burden Bankruptcy Rule 4003(c) requires if Bankruptcy Rule 4003(c) controls and Cadle has the burden of proof. Cadle argues that the Court should adopt a shift in burden standard. Cadle cites *In re Cole, supra*, for its assertion that a claimed exemption is prima facie valid until the presumption is rebutted; that to rebut the presumption, the objecting party must present persuasive evidence to support the contention that the presumption of validity must be rebutted; and that then the debtor must come forward with unequivocal evidence that the exemption is proper. But what *Cole* actually says is that the party contesting the exemption has the burden to show it was improperly claimed and *only when that burden is satisfied* must the debtor come forward with evidence that the exemption is proper. Cadle not only did not present persuasive evidence that the presumption should be rebutted, but in fact presented absolutely *no evidence* that the presumption should be rebutted. Cadle failed to meet its burden and, therefore, it loses.

Curiously, Cadle asserts, without citation to any case, that

> the imposition of a direct and all encompassing burden on the objecting creditor – often

> without access to the same information available to debtors or the resources to fully litigate an objection to exemption – *inappropriately* shifts the focus of bankruptcy from generally including all property as part of a bankruptcy estate . . . to favoring and protecting certain property claimed by debtors as exempt from the reach of creditors.

This argument clearly overlooks the general rule restated in *In re Cole*, *supra*, that the exemption statute favors the debtor and is to be liberally construed; that when an issue is in doubt because of the proof provided and the Court would be required to speculate, the party upon whom the burden of proof ultimately rests must lose. Thus, the exemptions claimed by debtors are presumed valid until proven otherwise. *In Re Cole*, *supra* at 384-385. *See also Matter of Swift*, *supra* at 801.

Further, as stated previously in this brief, the purported lack of access to information and the lack of resources to pursue objections is not substantiated by the record. Cadle points to no evidence that it lacked access to information and lacked resources. Cadle readily admits that it made no effort to obtain any documents from Fidelity Investments, T. Rowe Price, or the IRS. R. 6:901. And based on the volumes of pleadings filed in this case and the appeals taken, Cadle clearly does not lack resources.

Cadle cites *In re Carter*, 182 F.3d 1027, 1029-30 (9th Cir. 1999) for its proposition that it is "simply not enough for the debtor to state a claim of exemption and then sit back and tell the creditor 'prove me wrong." But, as seems to be a pattern in Cadle's brief, the case does not say that. Instead, *Carter* says that once an exemption is claimed, it is the *objecting party's* burden to prove that the exemption is not proper and that this means that initially, the *objecting party* has the burden of *production* **and** *persuasion* and must produce evidence to rebut the presumptively valid exemption. *Id.*

Cadle also cites *In re Mauer*, 268 B.R. 335 (Bankr. W.D.N.Y. 2001) for the same proposition. But *Mauer* differs from the case before this Court. First, *Mauer* deals with the exemptibility of IRAs pursuant to a New York State exemption statute, which, unlike the Texas statute, does not provide that the IRAs are *exempt unless* they do not qualify under the IRC. Id. Second, unlike the case before this Court, it does not appear that the debtor in *Mauer* produced any documents regarding his claimed exemption. *Id.* at 336; 338.

In the case at hand, the Debtors have provided Cadle with volumes of documents which support their claims of exemption, including initial applications for each IRA which indicate approval by the financial institutions; initial and subsequent IRA custodial agreements and disclosure statements the forms of which were pre-approved by the IRS; IRS determination letters, where the forms were not pre-approved; IRA contribution records; Debtors' payroll records; and Debtors' bank statements. Cadle's counsel confirmed this by stating at the hearing that the debtors had provided Cadle with documents sufficient to support, to Cadle's satisfaction, that the IRAs were properly funded,

and Cadle admitted in its brief that the issue of whether the IRAs were established is not in particular dispute. R. USCA 5 49. The debtors and their witnesses' testimony further evidenced the claimed exemptions. Cadle failed to provide any evidence that the IRAs were not exempt and therefore it must lose.

Cadle then cites the Bankruptcy Court decision of *In re Foster*, for the proposition that the debtor has the initial burden of production to establish that the referenced property qualifies for the claimed exemption before the objecting party is obligated to go forward with his proof. *In re Foster*, 360 B.R. at 213-14. As discussed previously, *Foster* is consistent with the holding in the case before this Court. The Court in *Foster* held that Rule 4003(c) governed objections to exemptions and that the debtor had to make an initial showing that he was entitled to the exemption.

The debtors made the initial showing that the assets claimed as exempt are IRAs and then it was up to Cadle to prove that they do not qualify under the IRC and therefore must lose.

The Petitioner has failed to demonstrate any compelling reason why this Court should grant the Petition. Because the facts of this case are so one-sided that the case would be decided in favor of Respondents no matter how the burden of proof issue was resolved, even if there were an important federal question decided by the Fifth Circuit, this case presents a poor vehicle for resolving it. Further *certiorari* may be denied where resolution would be irrelevant to the ultimate outcome of the case. *See Sommerville v. United States*, 376 U.S. 909 (1964) (*cert. denied*).

CONCLUSION

Petitioner has not established any compelling reason for this Court to grant the Petition.

(1) Petitioner has not demonstrated why this Court should grant the Petition when the Fifth Circuit did not decide an important issue of federal law by *per curiam* affirming without opinion and determining that the decision should not be published and had no precedential value;

(2) Petitioner has not demonstrated why this Court should grant the Petition when Petitioner waived its arguments presented before this Court by admitting to a different burden of proof in the trial court and by failing to present these arguments in the trial court;

(3) Petitioner has not demonstrated why this Court should grant the Petition when the ultimate outcome would not be any different because no matter what burden of proof is applied, Petitioner would still lose.

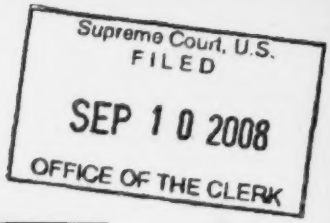
For the foregoing reasons, Respondents respectfully request that the Petition be denied.

Respectfully submitted,

ROSEMARY J. ZYNE
5430 L. B. J. Freeway
Suite 1200
Dallas, Texas 75240
(214) 739-9119
(214) 739-2332 (Facsimile)

Attorney for Respondents

105



(3)

No. 08-133

IN THE

Supreme Court of the United States

THE CADLE COMPANY, PETITIONER

v.

JOSEPH M. FRIEDHEIM AND JOYCE A. FRIEDHEIM

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF

BRUCE W. AKERLY
Counsel of Record

Bell Nunnally & Martin LLP
3232 McKinney Avenue
Suite 1400
Dallas, Texas 75204
(214) 740-1430

Attorneys for Petitioner

CURRY & TAYLOR • (202) 350-9073

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

THE CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW 1

WAIVER IS A NON-ISSUE 3

CONCLUSION 7

TABLE OF AUTHORITIES

Page

CASES

DALE V. FINANCE AMERICA CORP., 929 S.W.2D 495 (TEX. APP. – FORT WORTH 1996, WRIT DENIED) 6
IN RE CARTER, 182 F.3D 1027 (9TH CIR. 1999) 4
IN RE HARRINGTON, 306 B.R. 172 (BANKR. E.D. TEX. 2003) 4, 5
IN RE MAUER, 268 B.R. 335 (BANKR. W.D. N.Y. 2001) 4, 5
JONES V. AMERICAN AIRLINES, 131 S.W.3D 261 (TEX. APP.- FORT WORTH 2004, NO PET.) 6
LOZANO V. LOZANO, 975 S.W.2D 63 (TEX. APP.- HOUSTON [14TH DIST.] 1998, PET. DENIED) 6
PILLITTERI V. BROWN, 165 S.W.3D 715 (TEX. APP. - DALLAS 2004, NO PET.) 6
RALIEGH V. ILLINOIS DEPT. OF REVENUE, 530 U.S. 15 (2000) 2, 4
RUCKER V. RUCKER, 810 S.W.2D 793 (TEX. APP. - HOUS. [14TH DIST.] 1991) 2, 6
STRAYHORN V. LEXINGTON INS. CO., 128 S.W.3D 772 (TEX. APP. – AUSTIN 2004, PET. GRANTED) 6

STATUTES

Tex. Prop. Code Ann. § 42.0021 5

RULES

5th Cir. R. 47.6 1
Bankruptcy Rule 4003(c) ..... *passim*
Sup. Ct. R. 10 1 1

THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW

Respondents argue that, because the Fifth Circuit entered a *per curiam* ruling, "there was no decision by the Fifth Circuit on an important question of federal law." (Res. Brf. 11). This understates the impact of the *per curiam* ruling. The Fifth Circuit's decisional silence speaks volumes as to its acceptance of the decisions below.

In affirming the lower court decisions, the Fifth Circuit effectively held that "no reversible error of law appears." 5th Cir. R. 47.6. The Fifth Circuit's affirmation did not, as Respondents suggest, constitute a failure to address an important federal question in a way that conflicts with state law. (Res. Brf. 11) *See also* Sup. Ct. R. 10.

In affirming the lower court decisions, the Fifth Circuit accepted the District Court's failure to undertake an *Erie* guess as to what the Texas courts would do or certify the question on burden of proof to the Texas Supreme Court. Instead, the District Court, like the Bankruptcy Court, simply defaulted to Bankruptcy Rule 4003(c) as governing burden of proof issue – i.e., that Petitioner bore the entire burden of proof.[1]

As noted in Petitioner's principal brief, bankruptcy does not alter the burden of proof established by substantive law. (Pet. Brf. 12-18). Bankruptcy Rule 4003(c) requires that the objecting party bear the entire burden of proof. Under Texas

---

[1] Petitioner also requested, by separate motion, that the Fifth Circuit certify the question to the Texas Supreme Court. The Fifth Circuit denied the motion.

law, a party claiming an exemption based on an individual retirement account - challenged by a creditor – bears the burden of proving that they are entitled to the exemption permitted Section 42.0021. *Rucker v. Rucker*, 810 S.W.2d 793, 795-96 (Tex. App. – Hous. [14th Dist.] 1991) ("It is the burden of the party claiming the exemption to prove he is entitled to it.").

By placing the entire burden of proof on Petitioner, pursuant to Bankruptcy Rule 4003(c), the Bankruptcy Court, District Court, and Fifth Circuit, not only disregarded Texas law, they departed from the well accepted and usual course of judicial proceedings, as recognized by this Court under similar circumstances. *See e.g., Raliegh v. Illinois Dept. of Revenue*, 530 U.S. 15 (2000) ("[B]ankruptcy does not alter the burden imposed by the substantive law.").[2] Burden of proof is a substantive issue which is governed by substantive law. To the extent Bankruptcy Rule 4003(c) conflicts with Texas law, Texas law on burden of proof must control.[3]

---

[2] Respondents urge that the Bankruptcy Court's alternative rulings (*see* Pet. Brf. n. 2) solve the problem. (Res. Brf. 22-25). Nothing could be further from the truth. "Either/or" rulings are troubling and unfortunate. They present no legal analysis and suggest an in-security in the decision making process. In a very real sense, alternative rulings do little to promote the decision making process. A party is entitled to know what burden of proof will be applicable to the outcome of the proceeding. Otherwise, the party is unable to properly prepare its case for trial – i.e., if it has the entire burden it will likely prepare for trial one way as opposed to another. It is not enough for a trial court to say at the beginning or conclusion of the proceedings: "I do not know who has the burden. If the plaintiff does, you lose; if the defendant does, you win."

[3] Respondents boldly and arrogantly proclaim that "[b]ecause the facts of this case are so one-sided...the case would be decided in favor of Respondents no matter how the burden of proof issue was

Affirmation by the Fifth Circuit constituted acceptance of the lower court decisions on the legal issues. The legal issue is whether the correct burden of proof was initially applied to the proceedings before the Bankruptcy Court. Based on the foregoing, this case clearly presents an important question of federal law decided by the lower courts: when state law conflicts with a federal procedural rule regarding the burden of proof should a bankruptcy court be required to follow state law? The petition for writ of certiorari should be granted.

WAIVER IS A NON-ISSUE

Respondents also claim Petitioner failed to timely raise before the Bankruptcy Court the burden of proof issues presented to this Court. Respondents assert that (a) Petitioner "admitted in trial court to a different burden of proof than argued to this Court" and, therefore, "waived its arguments by failing to timely raise them" (Res. Brf. 12); (b) Petitioner "never argued at trial that the state law burden should apply or that

---

resolved, [and] even if there were an important federal question decided by the Fifth Circuit, this case presents a poor vehicle for resolving it." (Res. Brf. 29). This, of course, is a merits based argument. All of the records produced at the evidentiary hearing found their source in Respondents. None of the documents proved that the IRAs at issue were qualified under the IRC. At best they proved that the Respondents had IRAs. Had the burden of proof under Texas law been applied, rather than that set forth in Bankruptcy Rule 4003(c) – as is required under this Court's precedents – the evidence, may very well have been viewed by the Bankruptcy Court in an entirely different light – i.e., Respondents (rather than Petitioner) failed to demonstrate qualification. This frames the importance of the legal issue before the Court.

the state law conflicted with Bankruptcy Rule 4003(c)...." (*Id.* 16). This assertion is incorrect.

Prior to the beginning of the evidentiary hearing on Petitioner's Objection to Exemptions, Petitioner filed *The Cadle Company's Hearing Brief (Burden of Proof)* (Bankr. Adv. Dkt. No. 78). In this brief:

- Petitioner begin by stating that "Debtors cannot establish that the IRAs are properly qualified under applicable law."
- Petitioner, relying on authorities cited before this Court (*see e.g.*, *In re Carter*, 182 F.3d 1027 (9th Cir. 1999); *In re Harrington*, 306 B.R. 172 (Bankr. E.D. Tex. 2003); *In re Mauer*, 268 B.R. 335 (Bankr. W.D. N.Y. 2001)), argued that "[i]t is only logical that the burden of proof on the issue of whether the IRAs at issue qualify as exempt under Texas law will initially lie with Debtors."
- Petitioner further argued that to not institute a shifting burden, i.e., one which required the debtor to introduce sufficient evidence to overcome the burden of persuasion, resulted in a bankruptcy system in which

> [d]ebtors could list anything as 'exempt,' produce nothing to validate the exemption, and then effectively [reverse] shift the burden to the trustee and/or other parties in interest to prove it is not properly claimed. Most creditors and trustees in an estate that has little resources or is no-asset – such as Debtor's estate – will have little capability to

> prosecute an objection if they have to bear such an initial burden. In fact, such a procedure has been labeled an 'exemption by declaration' and is not a proper approach to justice in the bankruptcy court (*citing In re Mauer*, 268 B.R. at 339 n.5).

- Petitioner further argued that "it is the debtor, not the objector who benefits from the exemption by keeping the claimed property out of the bankruptcy estate; therefore, something from the debtor substantiating the exemption, absent a bare assertion, must be necessary to prove the debtor's entitlement to it." *See In re Harrington*, 306 B.R. at 181 (holding that "in the face of an objection[,] this Court believes that a debtor must sustain a minimal burden going forward with the evidence to establish that the referenced property qualifies for the particular exemption claimed before the objecting party is obligated to go forward with its proof.").
- Finally, Petitioners concluded their hearing brief by noting that "Debtors have the initial burden of proof on the issue of whether the IRAs scheduled by Debtors qualify under applicable law."[4] Petitioners requested that

[4] In a footnote to this statement, Petitioners clearly noted that Texas law differs from Bankruptcy Rule 4003(c) in that it provides that "a party claiming an exemption under section 42.0021 bears the burden of proving that he or she is entitled to the exemption." (The Cadle Company's Hearing Brief (Burden of Proof) n.5, *citing*, Tex. Prop. Code Ann. § 42.0021; *Pillitteri v. Brown*, 165 S.W.3d

> the Bankruptcy Court require Respondents to "produce sufficient, unequivocal evidence to establish that the scheduled IRAs qualify under applicable law. Only after Debtors overcome this initial burden of production should the burden shift to Cadle."

The Bankruptcy Court overruled Petitioner's request that the initial burden of proof lie with Respondents and instead held that Petitioner had the entire burden of proof, production and persuasion, to establish that the IRAs were not qualified under applicable law. (See App. 14a – Petitioner bore "the burden of proving [by a preponderance of the evidence] that the Debtors' exemption are not properly claimed."]. In doing so, the Bankruptcy Court required Petitioner to proceed under a standard of proof which conflicts with the burden of proof standard required under Texas law, as well as the concepts of equity and fairness embodied within the Bankruptcy Code.

Based on the foregoing, it can hardly be said that Petitioner waived the burden of proof issue. This Court is not prevented from granting review on this basis.

715, 723 (Tex. App. – Dallas 2004, no pet.); *Strayhorn v. Lexington Ins. Co.*, 128 S.W.3d 772, 785-86 (Tex. App. – Austin 2004, pet. granted); *Jones v. American Airlines*, 131 S.W.3d 261, 270 (Tex. App.- Fort Worth 2004, no pet.); *Lozano v. Lozano*, 975 S.W.2d 63, 67 (Tex. App.- Houston [14th Dist.] 1998, pet. denied); *Dale v. Finance America Corp.*, 929 S.W.2d 495, 498-99 (Tex. App. – Fort Worth 1996, writ denied); *Rucker v. Rucker*, 810 S.W.2d 793, 795-96 (Tex. App. – Houston [14th Dist.] 1991, writ denied) (holding that the appellant failed to prove his entitlement to the claimed exemption because he did not establish that his retirement plan qualified under applicable provisions of the Internal Revenue Code as required by 42.0021)).

CONCLUSION

This Court should grant the instant petition for writ of certiorari. A significant and important issue of federal law is presented by this appeal, namely whether state substantive law (*i.e.*, Section 42.0021) rather than federal procedural law (*i.e.*, Bankruptcy Rule 4003(c)) should govern the issue of the applicable burden of proving a claimed exemption in bankruptcy. Alternatively, Petitioner maintains that this Court should adopt a shift in burden standard applicable to Bankruptcy Rule 4003(c) and hold that property claimed as exempt is *prima facie* exempt until the presumption of validity is rebutted. Because the Courts below adopted an incorrect standard of proof under Bankrutpcy Rule 4003(c) their decisions should be reversed and remanded for further proceedings.

Respectfully submitted,

Bruce W. Akerly
Counsel of Record
BELL NUNNALLY & MARTIN LLP
3232 McKinney Avenue
Suite 1400
Dallas, Texas 75204
(214) 740-1430
Attorney for Petitioner